(9)

No. 90-18

In The

Supreme Court of the United States

October Term, 1990

ROBERT D. GILMER,

Petitioner,

v.

INTERSTATE/JOHNSON LANE CORPORATION,

Respondent.

On Writ Of Certiorari To The
United States Court Of Appeals For The
Fourth Circuit

BRIEF ON THE MERITS FOR RESPONDENT

*James B. Spears, Jr.
Robert S. Phifer
Haynsworth, Baldwin, Johnson
& Greaves, P.A.
901 West Trade Street
Suite 1050
Charlotte, NC 28202
(704) 342-2588

Attorneys for Respondent
*Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

May a court in accordance with the Federal Arbitration Act, 9 U.S.C. §§ 1-15, compel arbitration of an individual claim of age discrimination brought under the Age Discrimination in Employment Act, 29 U.S.C. §§ 621-633a?

PARTIES AND LIST OF AFFILIATED CORPORATIONS

See page ii of Respondent's Brief in Opposition to the Petition.

TABLE OF CONTENTS

Page

Question Presented i

Parties and Lists of Affiliated Corporations ii

Table of Authorities v

Statutory and Other Provisions Involved 1

Statement of the Case 1

Summary of Argument 3

Argument 7

I. THE FAA REQUIRES ENFORCEMENT OF PETITIONER'S AGREEMENT TO ARBITRATE BECAUSE CONGRESS HAS NOT EXCEPTED ADEA CLAIMS FROM THE MANDATE OF THE FAA AND SUCH CLAIMS ARE NOT INHERENTLY UNSUITABLE FOR ARBITRATION 7

A. Petitioner's Arguments That Arbitration Cannot Adequately Resolve His ADEA Claim Are Neither Legally Nor Factually Sufficient To Avoid Arbitration 13

1. Petitioner's Policy Arguments About The Adequacy Of Arbitration To Resolve A Statutory Claim Are Not Legally Sufficient To Avoid Enforcement Of His Agreement 13

2. The Arbitral Procedures Applicable To Petitioner's ADEA Claim Provide A Sound And Fair Method For Resolving His Claim On Its Merits 17

TABLE OF CONTENTS – Continued

Page

B. Petitioner's Concerns About The Relative Bargaining Powers Of The Parties Are Not A Proper Basis For Denying Arbitration 26

C. The Fourth Circuit Correctly Ruled That Arbitration Would Not Conflict With The Statutory Enforcement Scheme Established By The ADEA 29

D. *Alexander, Barrentine, McDonald* And *Buell* Do Not Preclude Arbitration Of ADEA Claims 35

E. Summary of Argument 40

II. THE ARBITRATION AGREEMENT APPLICABLE TO PETITIONER'S CLAIMS IS ENFORCEABLE UNDER THE FEDERAL ARBITRATION ACT 42

Conclusion 50

TABLE OF AUTHORITIES

Page

CASES

A. G. Edwards & Son, Inc. v. Smith, 11 Empl. Ben. Coord. (BNA) 2430 (D. Ariz. 1989) 45

Alberto-Culver Co. v. Scherk, 484 F.2d 611 (7th Cir. 1973), *rev'd*, 417 U.S. 506 (1974) 17

Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974) *passim*

Alford v. Dean Witter Reynolds, Inc., 905 F.2d 104 (5th Cir. 1990) 40

American Postal Workers Union v. United States Postal Serv., 823 F.2d 466 (11th Cir. 1987) 46

Andros Compania Maritima v. Marc Rich & Co., A.G., 579 F.2d 691 (2d Cir. 1978) 19

Arnulfo P. Sulit, Inc. v. Dean Witter Reynolds, Inc., 847 F.2d 475, (8th Cir. 1988) 41

Aspero v. Shearson American Express, Inc., 768 F.2d 106 (6th Cir. 1985) 44

Atchison, Topeka and Santa Fe Ry. Co. v. Buell, 480 U.S. 557 (1987) 35, 36, 37, 38, 39, 41

Barrentine v. Arkansas-Best Freight System, Inc., 450 U.S. 728 (1981) 35, 37, 38, 39, 41

Bernhardt v. Polygraphic Co. of Amer., Inc., 218 F.2d 948 (2d Cir. 1955), *rev'd*, 350 U.S. 198 (1956) 49

Brown v. Gilligan, Will & Co., 287 F. Supp. 766 (S.D.N.Y. 1968) 44

Brown v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 664 F. Supp. 969 (E.D. Pa. 1987) 44

Coenen v. R. W. Pressprich & Co., 453 F.2d 1209 (2d Cir.), *cert. denied*, 406 U.S. 949 (1972) 43

TABLE OF AUTHORITIES – Continued

Page

Cullen v. Paine, Webber, Jackson & Curtis, Inc., 587 F. Supp. 1520 (N.D. Ga. 1984) 28, 44

Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213 (1985) 8, 36, 50

Dickstein v. duPont, 443 F.2d 783 (1st Cir. 1971) 49

Erving v. Virginia Squires Basketball Club, 468 F.2d 1064 (2d Cir. 1972) 19, 49

Gilmer v. Interstate/Johnson Lane, 895 F.2d 195 (4th Cir. 1990) ..... *passim*

Jeske v. Brooks, 875 F.2d 71 (4th Cir. 1989) 15

Legg, Mason & Co. v. Mackall & Coe, Inc., 351 F. Supp. 1367 (D.D.C. 1972) 44, 45

Malison v. Prudential-Bache Secs., 654 F. Supp. 101 (W.D.N.C. 1987) 44

McDonald v. City of West Branch, 466 U.S. 284 (1984) 35, 37, 38, 39, 41

Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Hovey, 726 F.2d 1286 (8th Cir. 1984) 43

Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985) ..... *passim*

Morgan v. Smith Barney, Harris Upham & Co., 729 F.2d 1163 (8th Cir. 1984) 44

Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp., 460 U.S. 1 (1983) 8, 11, 35

New York Gaslight Club, Inc. v. Carey, 477 U.S. 54 (1980) 23

TABLE OF AUTHORITIES – Continued

Page

Nicholson v. CPC Internat'l, Inc., 877 F.2d 221 (3d Cir. 1989) 22, 40

O'Neel v. National Ass'n of Sec. Dlrs., Inc., 667 F.2d 804 (9th Cir. 1982) 45

Perry v. Thomas, 482 U.S. 483 (1987) 49, 50

Pierce v. Shearson Lehman Hutton, Inc., 52 Fair Empl. Prac. Cas. (BNA) 1882 (N.D. Ill. 1990) 41

Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395 (1967) 27, 45

Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 109 S.Ct. 1917 (1989) ..... *passim*

Roe v. Kidder, Peabody & Co., 52 Fair Empl. Prac. Cas. (BNA) 1865 (S.D.N.Y. 1990) 41

Rogers v. Frito-Lay, Inc., 611 F.2d 1074 (5th Cir. 1980), *cert. denied*, 449 U.S. 889 (1980) 33

Scharnhorst v. Independent School Dist. #710, 686 F.2d 637 (8th Cir. 1982), *cert. denied*, 462 U.S. 1109 (1983) 30

Shearson/American Express, Inc. v. McMahon, 482 U.S. 220 (1987) ..... *passim*

Shearson Lehman/American Express, Inc. v. Bird, 110 S.Ct. 225 (1989), *vacating and remanding* 871 F.2d 292 (2nd Cir. 1989) 41

Signal-Stat Corp. v. Local 475, United Elec. R. & M. Workers, 235 F.2d 298 (2d Cir. 1956), *cert. denied*, 354 U.S. 911 (1957) 49

TABLE OF AUTHORITIES – Continued

Page

Stokes v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 523 F.2d 433 (6th Cir. 1975) 48

Swenson v. Management Recruiters Internat'l., Inc., 858 F.2d 1304 (8th Cir. 1988), *cert. denied*, 110 S.Ct. 143 (1989) 40

Tenney Eng. v. United Elec., R. & M. Workers, 207 F.2d 450 (3d Cir. 1953) 48

Tonetti v. Shirley, 173 Cal. App. 3d 1144, 219 Cal. Rptr. 616 (1985) 49

Tullis v. Kohlmeyer & Co., 551 F.2d 632 (5th Cir. 1977) 44

United Air Lines, Inc. v. McMann, 434 U.S. 192 (1977) 33

United Elec. R. M. Workers v. Miller Metal Products, 215 F.2d 221 (4th Cir. 1954) 47

United Paperworkers Internat'l Union v. Misco, Inc., 484 U.S. 29 (1987) 48

United States v. Oregon, 366 U.S. 643 (1961) 33

Utley v. Goldman Sachs & Co., 883 F.2d 184 (1st Cir. 1989), *cert. denied*, 110 S.Ct. 842 (1990) 40

Washington v. New York City Board of Estimate, 709 F.2d 792 (2d Cir.), *cert. denied*, 464 U.S. 1013 (1983) 30

Wilko v. Swan, 346 U.S. 427 (1953) 9, 12, 16, 17, 25

Willis v. Shearson/American Express, Inc., 569 F. Supp. 821 (M.D.N.C. 1983) 23

TABLE OF AUTHORITIES – Continued

Page

STATUTES

Age Discrimination in Employment Act, as amended, 29 U.S.C. §§ 621-633a ..... i, 3

29 U.S.C. § 626 ..... 22, 29, 31

Fair Labor Standards Act, as amended; 29 U.S.C. §§ 201-219

29 U.S.C. § 211 29

29 U.S.C. § 216 ..... 22, 31

Federal Arbitration Act, 9 U.S.C. §§ 1-15

9 U.S.C. § 1 ..... 6, 37, 38, 42, 45, 46, 48, 49

9 U.S.C. § 2 ..... 4, 7, 9, 26, 44

9 U.S.C. § 3 ..... 2, 8

9 U.S.C. § 4 ..... 8, 26, 27

9 U.S.C. § 7 21

9 U.S.C. § 10 ..... 19, 23, 24

9 U.S.C. § 11 23

9 U.S.C. § 15 14

National Labor Relations Act, 29 U.S.C. §§ 151-168

29 U.S.C. § 160 32

Older Workers Benefit Protection Act, Pub. L. 101-433, Title II (1990) 34

Public Law Amending the Federal Arbitration Act, Pub. L. 91-368, 84 Stat. 693 (1970) 34, 35

TABLE OF AUTHORITIES – Continued

Page

Public Law Amending the Federal Arbitration Act, Pub. L. 100-702, 102 Stat. 4671 (1988) 34

LEGISLATIVE MATERIALS

Civil Rights Act of 1990, Section 18, *reprinted in Conf. Rep. on Civil Rights Act of 1990*, H.R. Doc. No. 101-856, 101 Cong., 2d Sess. (1990) 32, 34

Joint Explanatory Statement of the Committee of Conference, reprinted in Conf. Rep. on Civil Rights Act of 1990, H.R. Doc. No. 101-856, 101 Cong., 2d Sess. (1990)..... 33

Hearing before a Subcommittee of the Senate Committee on the Judiciary on S.4213 and S.4214, 67th Cong., 4th Sess. 9 (1923)..... 47

ARTICLES

Note, *Agreements to Arbitrate Claims Under the Age Discrimination in Employment Act*, 104 Harv. L. Rev. 568 (1990) 11, 22, 26, 29, 34, 39

Note, *Classwide Arbitration and 10b-5 Claims In the Wake of Shearson/American Express, Inc. v. McMahon*, 74 Cornell L. Rev. 380 (1989)..... 22

Note, *To Arbitrate Or Not To Arbitrate? The Protection of Rights Under The Age Discrimination In Employment Act*, 1988 Journal of Dispute Resolution 199 16

Shell, *ERISA and Other Federal Employment Statutes: When Is Commercial Arbitration an "Adequate Substitute" for the Courts?*, 68 Tex. L. Rev., 509 (1990)..... 39

TABLE OF AUTHORITIES – Continued

Page

Siconolfi, *Blow to Brokers: Stock Investors Win More Punitive Awards in Arbitration Cases*, Wall St. J., June 11, 1990..... 23

Waks & Ginsberg, *Arbitrating Executive and Other Employment Disputes: Let's Put a Pin In Gardner-Denver!, reprinted in* Proceedings of New York University's 43rd National Conference on Labor, 62 (Little Brown, to be published December 1990)..... 28

OTHER MATERIALS

EEOC Notice No. N-915-060 (August 29, 1990) 41

New York Stock Exchange Rule 347..... 1

New York Stock Exchange Arbitration Rules

Rule 608 18

Rule 609 18

Rule 610 18

Rule 612 .....21, 22

Rule 614 19

Rule 619 .....20, 21

Rule 620 21

Rule 623 23

Rule 627 ..... 22, 24, 25

TABLE OF AUTHORITIES – Continued

Page

Proceedings of the Twenty-Sixth Annual Convention of the International Seamen's Union of America, 203-04 (1923) 46

SEC Order Approving Proposed Rule Changes By New York Stock Exchange, Inc., Nat'l Ass'n of Sec. Dealers, Inc., and the American Stock Exchange, Inc., Relating to the Arbitration Process and the Use of Predispute Arbitration Clauses, 54 Fed. Reg. 21144 ..... 20, 24

SEC Order Approving Proposed Rule Change Relating To Amendments To Arbitration Procedures And Fees, 55 Fed. Reg. 38181 22

STATUTORY AND OTHER PROVISIONS INVOLVED

In addition to those statutory provisions designated by Petitioner, Respondent directs the Court's attention to Rule 347 of the Rules of the Board of Directors of the New York Stock Exchange, Inc., and the Arbitration Rules of the New York Stock Exchange, Inc., all of which are set out verbatim in the Appendix to this brief.

STATEMENT OF THE CASE

Petitioner became employed by Respondent in 1981 as a Manager of Financial Services. As required to perform the duties of his position, he registered as a securities broker with the New York Stock Exchange ("NYSE" or "the Exchange"). Petitioner was not a member of a union and, therefore, his employment was not subject to the terms of a collective bargaining agreement. Paragraph V of the registration agreement (Form U-4) submitted by Petitioner to the NYSE provides as follows: "I agree to arbitrate any dispute, claim or controversy that may arise between me and my firm . . . that is required to be arbitrated under the rules, constitutions or bylaws of the organizations with which I register. . . . " (J.A. at 18.)[1] NYSE Rule 347 provides for the arbitration of "[a]ny controversy . . . arising out of the employment or termination of employment" of a registered securities representative. (App. 1.)

Petitioner's employment with Respondent terminated in 1987. He filed a charge of discrimination with the Equal Employment Opportunity Commission ("EEOC") and subsequently filed his Complaint in the United States District Court for the Western District of

[1] Citations to "J.A." are to the Joint Appendix. Citations to "App." are to the Appendix to this brief.

North Carolina before the EEOC finished its investigation or attempted conciliation of his claim. Petitioner's Complaint presented only a single claim that his employer discharged him in violation of the ADEA. (J.A. at 4.) No other federal or state law claim (statutory or otherwise) is presented in this case; Petitioner also has not sought to initiate other legal proceedings regarding his employment with Respondent. The Complaint challenged no employment policy or practice of the Respondent that affects any other employee or applicant. The remedies Petitioner seeks are those traditionally sought in a single discharge claim; *i.e.*, individual reinstatement, backpay, and liquidated damages. Also, Petitioner seeks attorneys fees and court costs as authorized by federal law for a "prevailing party."

Interstate responded to Petitioner's federal court Complaint by filing a motion to compel arbitration of Petitioner's claim. (J.A. at 10.) The motion sought enforcement of the Petitioner's arbitration agreement as authorized by section 3 of the Federal Arbitration Act (FAA), 9 U.S.C. § 3. Although he opposed the motion, Petitioner presented no evidence before the district court that the agreement did not cover his dispute with Respondent. He also did not dispute the validity of his arbitration agreement. Indeed, Petitioner's counsel informed the district court that "I'm not alleging any fraud or anything." (J.A. at 42.) Petitioner also did not dispute evidence presented by his employer that the registration agreement containing the arbitration agreement was entered into by him as a requirement of performing the duties of his position. (J.A. at 74.) Instead, Petitioner's principal argument for avoiding arbitration has been simply that his statutory claim of age discrimination is not subject to the FAA's provisions.

The district court denied Respondent's motion and accepted Petitioner's argument that *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), precluded enforcement of the arbitration agreement. (J.A. at 85.) Respondent appealed the district court's refusal to enforce the arbitration agreement to the United States Court of Appeals for the Fourth Circuit. (J.A. at 78.)

The court of appeals reversed the district court's order in an opinion dated February 6, 1990. The appeals court held that the rationale underlying this Court's decisions in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985), *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220 (1987), and *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 109 S.Ct. 1917 (1989), mandated enforcement of Petitioner's written arbitration agreement and that nothing in the ADEA's text, history or purpose precluded arbitration of ADEA claims. *Gilmer v. Interstate/Johnson Lane*, 895 F.2d 195 (4th Cir. 1990). The court of appeals denied Petitioner's motion for rehearing and suggestion for rehearing *en banc* on March 28, 1990. Petitioner filed a Petition for Certiorari in this Court on June 26, 1990. The Petitioner presented two questions for review: (1) "Are claims brought pursuant to the Age Discrimination in Employment Act, 29 U.S.C. § 621, *et seq.* ("ADEA"), subject to compulsory arbitration?" and (2) "Is an arbitration clause executed six years before any claim arises under the ADEA an invalid prospective waiver?" On October 1, 1990, the Court granted certiorari as to the single issue of whether ADEA claims are subject to compulsory arbitration.

SUMMARY OF ARGUMENT

This case presents the single issue of whether, under the FAA, Petitioner can be compelled to arbitrate his

ADEA claim. The Fourth Circuit in reversing the district court's denial of arbitration held that Plaintiff could be compelled to arbitrate his ADEA claim. Respondent submits that the circuit court's ruling should be affirmed.

The court of appeals determined the arbitrability of Petitioner's ADEA claim by following the analytical framework of this Court's recent decisions in *Mitsubishi v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985), *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 614 (1985), and *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989). Those decisions resoundingly rejected the premise that statutory claims are inherently unsuited for arbitration. Instead, those cases recognized a rebuttable presumption favoring arbitrability in light of the congressional policy stated in the FAA. The FAA expressly mandates enforcement of private arbitration agreements "save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. In applying this presumption to statutory claims, the Court made clear in *McMahon* that arbitration should be compelled, unless the party opposing arbitration can affirmatively demonstrate that, in enacting the statute giving rise to the claim, Congress intended to preclude a waiver of a judicial forum.

Petitioner has not met his burden of affirmatively showing that Congress intended to except ADEA claims from compulsory arbitration. He concedes that neither the text nor legislative history of the ADEA contains any reference to arbitration. Moreover, his arguments that arbitration conflicts with the inherent purpose of the ADEA fall far short of rebutting the presumption favoring arbitrability.

The *Mitsubishi – McMahon – Rodriguez de Quijas* trilogy establishes that the Court narrowly construes the type of evidence that will suffice to show a conflict

between statutory rights and arbitration. In large measure, Petitioner simply argues archaic perceptions that arbitration will not provide him with an adequate forum to pursue his statutory claim. These arguments give little regard to the well-established procedures of the NYSE that will provide the forum for his claim and simply anticipate problems that may in fact never occur. The *Mitsubishi* trilogy rejected such arguments as nothing more than the very hostility towards arbitration that the FAA was intended to overcome. Petitioner's concerns that arbitration will conflict with the statutory framework of the FAA also are unfounded. Arbitration will not diminish the EEOC's enforcement role. It also does not conflict with the jury trial option or role of the courts under the ADEA. The jury trial option in ADEA cases is one that can be waived, just as in other statutory cases where arbitration agreements have been enforced. Similarly, there is no requirement in the ADEA that courts decide all cases. Private parties are free under the statute to settle cases or to choose state courts over federal courts, all without judicial supervision. No reason exists why they should not similarly be free to agree on arbitration as the means for resolving their disputes, particularly where, as here, arbitration involves no waiver of substantive rights and will be subject to judicial review to ensure that the Petitioner's ADEA claim is given due regard in the arbitral proceeding.

Finally, Petitioner's argument, premised on *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974) and related cases, that ADEA claims are in a special category of rights inherently unsuited for arbitration misconstrues those authorities. None of those cases dealt with the enforceability of an individual arbitration agreement. None applied the FAA's presumption favoring arbitration to the claim at issue. Instead, those cases dealt either with the

preclusive effect that should be accorded collective bargaining arbitration (a much more limited form of arbitration than available here) or with whether a statutory collective bargaining procedure provided the exclusive remedy for the wrong alleged. The issues decided were thus materially different than that presented here, and the Court's decisions in those cases are not controlling.

Amici curiae in support of Petitioner argue that the FAA does not apply to this case. They rely on language in section 1 of the Act that excludes "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce" from coverage by the FAA. 9 U.S.C. §1. Petitioner never raised this argument below, nor did he petition for certiorari on this issue. The issue is thus not properly before this Court.

In any event, the amici overlook that Petitioner's arbitration agreement is enforceable under the FAA over and above any connection it has with his employment with Respondent. The arbitration agreement is enforceable as a material part of Petitioner's registration agreement with the NYSE. He is thus bound by that agreement the same as Respondent and all others who contract to do business with the Exchange are bound by the Exchange's rules, bylaws and constitution. On this basis, courts universally have held such arbitration agreements enforceable under the FAA.

The amici also construe section 1's exclusionary language far too broadly in applying it to Petitioner's arbitration agreement. Petitioner, as a professional broker and senior-level executive, does not fit within the categories of "workers" to which Congress intended the exclusion to apply.

ARGUMENT

In this case, the Court must decide whether Congress foreclosed arbitration of Petitioner's statutory claim of age discrimination in employment or whether, instead, the strong federal policies favoring arbitration require enforcement of Petitioner's agreement to arbitrate his employment dispute. The appeals court held that Petitioner's ADEA claim is subject to compulsory arbitration and that, under the FAA, the district court should have ordered Petitioner to arbitrate that claim. The appeals court's decision dealt principally with the question of enforceability, finding in this Court's recent decisions applying the FAA a strong presumption favoring enforcement of arbitration agreements. Although recognizing that in some statutory cases the FAA's presumption of enforceability may be overcome by clear evidence of a congressional intent to preclude arbitration of the statutory claim, the appeals court found no such intent in the ADEA. Notwithstanding Petitioner's arguments here, the appeals court was correct.

I. THE FAA REQUIRES ENFORCEMENT OF PETITIONER'S AGREEMENT TO ARBITRATE BECAUSE CONGRESS HAS NOT EXCEPTED ADEA CLAIMS FROM THE MANDATE OF THE FAA AND SUCH CLAIMS ARE NOT INHERENTLY UNSUITABLE FOR ARBITRATION.

A determination of whether Petitioner's agreement to arbitrate is enforceable as to his statutory age claim must begin with an analysis of the FAA. *McMahon*, 482 U.S. at 225. Under section 2 of the Act, Congress long ago provided that arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. The Act requires a court to stay its

proceedings and direct the parties to resolve their dispute through arbitration whenever any suit is brought on a matter within the scope of an agreement to arbitrate. 9 U.S.C. § 3. Similarly, the Act directs a court, upon petition by an aggrieved party, to order arbitration whenever a party has failed, neglected or refused to comply with an arbitration agreement. 9 U.S.C. § 4.

This Court has recognized that "[t]he legislative history of the [FAA] establishes that the purpose behind its passage was to ensure judicial enforcement of privately made agreements to arbitrate." *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S 213, 219 (1985). The Act thus represents "a congressional declaration of a liberal federal policy favoring arbitration agreements. . . . " *Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983). The statute's terms are mandatory; it "leaves no place for the exercise of discretion by a district court, but instead mandates that district courts *shall* direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed." *Byrd*, 470 U.S. at 218 (emphasis in original). Where questions of arbitrability arise under a particular agreement, such "questions . . . must be addressed with a healthy regard for the federal policy favoring arbitration. . . . The Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration. . . . " *Moses H. Cone Mem. Hosp.*, 460 U.S. at 24-25.

In *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985), this Court held that the congressional policy favoring enforcement of arbitration agreements applies with equal force to statutory claims. The Court rejected any notion that statutory claims should be subject to a per se rule of exclusion from the operation of the FAA:

> [W]e find no warrant in the Arbitration Act for implying in every contract within its ken a presumption against arbitration of statutory claims.

Id. at 625. The Court then described the framework for determining the arbitrability of statutory claims:

> [T]he first task of a court asked to compel arbitration of a dispute is to determine whether the parties' agreed to arbitrate that dispute. . . . [A]s with any other contract, the parties' intentions control, but those intentions are generously construed as to issues of arbitrability.
>
> There is no reason to depart from these guidelines where a party bound by an arbitration agreement raises claims founded on statutory rights. Some time ago this Court expressed "hope for [the Act's] usefulness both in controversies based on statutes or on standards otherwise created,"[2] . . . and we are well past the time when judicial suspicion of the desirability of arbitration and of the competence of arbitral tribunals inhibited the development of arbitration as an alternative means of dispute resolution. . . . Of course, courts should remain attuned to well-supported claims that the agreement to arbitrate resulted from the sort of fraud or overwhelming economic power that would provide grounds "for revocation of any contract."[3] . . . But, absent such compelling considerations, the Act itself provides no basis for disfavoring agreements to arbitrate statutory claims by skewing the otherwise hospitable inquiry into arbitrability.

Id. at 626-27 (citations omitted). Where the parties' agreement encompasses the statutory claim at issue, a second inquiry arises, which is the issue presently before the

---

[2] *Quoting Wilko v. Swan*, 346 U.S 427, 432 (1953) (footnote omitted).

[3] *Quoting* 9 U.S.C. § 2.

Court. A court must discern if "legal constraints external to the parties' agreement foreclosed the arbitration of those claims." *Id.* at 628. In making this determination, the Court explained that

> it is the congressional intention expressed in some other statute on which the courts must rely to identify any category of claims as to which agreements to arbitrate will be held unenforceable. . . . We must assume that if Congress intended the substantive protection afforded by a given statute to include protection against waiver of the right to a judicial forum, that intention will be deducible from text or legislative history. . . . Having made the bargain to arbitrate, the party should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue.

Id. at 627-28 (citations omitted).

Significantly, the Court rejected as unfounded any fears that the substantive rights advanced in a particular statutory claim would be lost or diminished if resolved in an arbitral, rather than a judicial, forum:

> By agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum. It trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration.

Id. at 628.

Following *Mitsubishi*, this Court consistently has underscored the strong policies favoring enforcement of arbitration agreements, even as to claims involving statutory rights. *See Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220 (1987); *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 109 S.Ct. 1917 (1989). *McMahon* has particular significance. It expands

upon the *Mitsubishi* framework for determining the arbitrability of a particular statutory claim, and emphasizes that the party opposing arbitration must carry the burden on that question. In *McMahon*, the Court stated:

> Like any statutory directive, the Arbitration Act's mandate may be overridden by a contrary congressional command. The burden is on the party opposing arbitration, however, to show that Congress intended to preclude a waiver of judicial remedies for the statutory rights at issue . . . . If Congress did intend to limit or prohibit waiver of a judicial forum for a particular claim, such an intent "will be deducible from [the statute's] text or legislative history," . . . or from an inherent conflict between arbitration and the statute's underlying purposes.

482 U.S. at 226-27, *quoting Mitsubishi*, 473 U.S. at 628. After *McMahon*, it is clear that, absent an affirmative showing that Congress specifically intended that particular statutory claims be resolved only in a judicial forum,[4]

---

[4] *Mitsubishi* and *McMahon* clearly hold that a congressional intent to exclude statutory claims from compulsory arbitration cannot be presumed. Rather, such an intent must be clearly demonstrated in the text or legislative history or by an inherent conflict between arbitration and the underlying purposes of the statute.

Reading *Mitsubishi*, *McMahon* and *Rodriguez de Quijas* together demonstrates that the Court narrowly construes the type of evidence that can show a congressional intent to preclude compulsory arbitration of particular statutory claims. *See* Note, *Agreements to Arbitrate Claims Under the Age Discrimination in Employment Act*, 104 Harv. L. Rev. 568, 573 (1990) (hereinafter cited as *"Harv. Note"*). This conclusion is evident in the Court's repeated affirmation of the "liberal federal policy favoring arbitration," *Moses H. Cone Mem. Hosp.*, 460 U.S. at 24, *quoted in Mitsubishi*, 473 U.S. at 625; and *McMahon*, 482 U.S. at 226; and its unwillingness to find that a statutory framework

(Continued on following page)

courts should hold a party to his agreement to arbitrate such claims.

The Fourth Circuit correctly applied the *McMahon* analysis in this case. In determining under the FAA that Petitioner should arbitrate his age claim in accordance with his agreement, the appeals court correctly followed the dictates of *Mitsubishi*, *McMahon*, and *Rodriguez*, finding that:

> nothing in the text, legislative history, or underlying purposes of the ADEA indicate[s] a congressional intent to preclude enforcement of arbitration agreements. Arbitration is nowhere mentioned in the text of the statute, and "[t]his silence in the text is matched by silence in the statute's legislative history." *McMahon*, 107 S.Ct. at 2344. Nor is there any statement on the part of Congress to indicate that a federal judicial forum is the only appropriate forum for vindication of the rights created by the ADEA. Moreover, we see no conflict between arbitration and the underlying purposes of the ADEA which would preclude arbitration of ADEA claims.

895 F.2d at 197. Significantly, at no time in the court below, nor in this Court, has Petitioner disputed the appeals court's determination that neither the ADEA's text nor its legislative history expressly forecloses compulsory arbitration. Petitioner instead has focused on

---

(Continued from previous page)

relying on judicial procedures and remedies in and of itself indicates a congressional intent to preclude arbitration, *see, e.g.*, *Mitsubishi*, 473 U.S. at 632-37; *McMahon*, 482 U.S. at 230-31 (rejecting argument that arbitration would weaken a plaintiff's ability to recover); *Rodriguez de Quijas*, 109 S.Ct. at 1920-21 (rejecting *Wilko v. Swan* determination that procedural rights afforded plaintiffs under the 1933 Securities Act showed a congressional intent to preclude compulsory arbitration of claims under that Act).

what he perceives to be the inadequacy of arbitration to resolve a statutory discrimination claim and on inherent conflicts that he claims exist between the ADEA's statutory framework and/or its underlying purpose and any arbitration. These arguments do not withstand scrutiny under the principles recently enunciated by this Court's opinions on the arbitrability of statutory claims.

A. Petitioner's Arguments That Arbitration Cannot Adequately Resolve His ADEA Claim Are Neither Legally Nor Factually Sufficient To Avoid Arbitration.

Petitioner argues at great length that arbitral procedures simply are inadequate to resolve an ADEA claim. He contends that compulsory arbitration might diminish his ability to vindicate his ADEA claim due to a variety of factors, including (i) the suspected potential bias of industry arbitrators; (ii) the suspected inexperience of arbitrators in dealing with statutory discrimination claims; (iii) the alleged unavailability of discovery; (iv) the alleged limited remedies that would be available in an arbitral proceeding; (v) the likelihood that arbitrators will not issue written opinions, thereby impairing judicial review and eliminating a source of doctrinal development under the Act; (vi) the limited grounds for vacating an award; and (vii) the purported narrow transactional focus of arbitral proceedings. Petitioner's argument falls far short of what the *McMahon* analysis requires under the FAA to deny enforcement of a valid agreement to arbitrate.

1. Petitioner's Policy Arguments About The Adequacy Of Arbitration To Resolve A Statutory Claim Are Not Legally Sufficient To Avoid Enforcement Of His Agreement.

Viewed candidly, Petitioner's arguments evidence only policy judgments that are premised on suspicions

and fears about arbitration as a mechanism for dispute resolution. This Court's recent decisions make clear that it no longer accepts such generalized objections as adequate bases upon which to deny arbitration of disputes, statutory or otherwise. *Mitsubishi*, 473 U.S. at 627. In fact, the Court has gone further to endorse the *prompt* enforcement of valid arbitration agreements, noting that objections such as those raised by Petitioner here may be better resolved at the award-enforcement stage.[5]

In *Mitsubishi*, for example, an amicus argued that the matter should not be sent to arbitration because the arbitral panel might misapply the law. It thereby presented a question about the "competency" of the panel to decide statutory issues. In rejecting this argument, the Court stated:

> We . . . have no occasion to speculate on this matter *at this stage in the proceedings*, when Mitsubishi seeks to enforce the agreement to arbitrate, *not to enforce an award*.

473 U.S. at 637 n.19 (emphasis added). The Court's observation is significant in that it underscores the obvious: there is no present need to resolve what may – but has not yet – become an objection to one or even several part(s) of a future arbitration.

The Court similarly emphasized in *Mitsubishi* that adequate safeguards were present *after* the arbitration to

---

[5] In November 1988 Congress amended the FAA to clarify when lower courts' orders involving enforcement of arbitration agreements are appealable. *See* 9 U.S.C. § 15. While an order denying enforcement of an arbitration agreement is immediately appealable under this section, an order enforcing such an agreement is appealable only after arbitration has been completed. *Compare* § 15(a) *with* § 15(b). This amendment underscores the priority Congress places on prompt enforcement of such agreements. *See Jeske v. Brooks*, 875 F.2d 71 (4th Cir. 1989) for a proper application of this recent amendment.

ensure that the procedure adequately addressed the statutory claims:

> Having permitted the arbitration to go forward, the national courts of the United States will have the opportunity *at the award-enforcement stage* to ensure that the legitimate interest in the enforcement of the antitrust laws has been addressed.

Id. at 638 (emphasis added). Implicit in the Court's observation is that speculation about potential problems does not aid resolution of the present inquiry on enforceability.

Other language in *Mitsubishi* further demonstrates that the Court is not inclined to prejudge the adequacy of a particular arbitral procedure in deciding whether to enforce an arbitration agreement. For example, the Court rejected concerns that antitrust claims had never before been resolved in an international arbitral tribunal, observing that

> the potential of these [arbitral] tribunals for efficient disposition of legal disagreements arising from commercial relations *has not yet been tested*. If they are to take a central place in the international legal order, national courts will need to "shake off the old judicial hostility to arbitration. . . . "

Id. at 638 (citation omitted; emphasis added). The Court also addressed an objection that arbitrators familiar with national law may not be available on the international arbitral tribunal that would hear the dispute. The Court rejected that objection, again articulating its clear preference that the arbitral proceeding be given a chance to deal with the issue:

> [A]daptability and access to expertise are hallmarks of arbitration. The anticipated subject matter of the dispute may be taken into account *when the arbitrators are appointed*. . . .

Id. at 633 (emphasis added).

In sum, the Court's approach in these cases has been to effectuate Congress' intention that arbitration agreements be liberally enforced under the FAA. In so doing, it consistently has discouraged just the type of policy judgments about arbitration that Petitioner advances here. *See* Note, *To Arbitrate Or Not To Arbitrate? The Protection of Rights Under The Age Discrimination In Employment Act*, 1988 Journal of Dispute Resolution 199, 217 ("The clear mandate in *Mitsubishi* is that it is the intent found in the text of the statute [giving rise to the claim], not the logical conclusions of the courts regarding the adequacy of arbitration, that is determinative."). Thus, the Court has demonstrated its preference that the courts enforce valid arbitration agreements. Particular objections to specific procedures or arbitrators are better resolved at the award-enforcement stage, after an adequate record has been compiled on which objections, if any, can be evaluated.

This approach simply applies common sense. A court too often is faced with an inadequate or nonexistent record to decide these questions at the threshold when it is deciding whether the arbitration agreement should be enforced at all. Justice Frankfurter's dissent in *Wilko v. Swan*, 346 U.S. 427, 439 (1953), in which the Court denied enforcement of an arbitration agreement as to 1933 Securities Act claims, supports this point. Justice Frankfurter noted that the majority decision did not rest on any evidence, either, "in the record . . . [or] in the facts of which [the Court could] take judicial notice" in concluding "that the arbitral system . . . would not afford the plaintiff the rights to which he is entitled."[6]

---

[6] Recent decisions of this Court have cited Justice Frankfurter's comments approvingly. *See McMahon*, 482 U.S. at 231, and *Rodriguez de Quijas*, 109 S.Ct. at 1921.

These same weaknesses exist in Petitioner's arguments here. As the discussion which follows shows, there is no record, nor any facts of which a court could take judicial notice, showing that the NYSE arbitration procedures available to Petitioner will prove inadequate to resolve his ADEA claim. Petitioner therefore cannot rebut the presumption favoring arbitration. He therefore should be required "to honor [his] bargain," *Mitsubishi*, 473 U.S. at 640, *citing Alberto-Culver Co. v. Scherk*, 484 F.2d 611, 620 (7th Cir. 1973) (Stevens, J., dissenting), *rev'd.*, 417 U.S. 506 (1974), by exhausting arbitration first and then – if needed – seeking judicial relief based on any inadequacies that he believes affects the outcome.

2. The Arbitral Procedures Applicable To Petitioner's ADEA Claim Provide A Sound And Fair Method For Resolving His Claim On Its Merits.

Petitioner's "suspicions" about the adequacy of arbitration represent nothing more than the same old hostility to arbitration that the FAA was intended to overcome, and that this Court has consistently rejected as a basis for refusing to enforce arbitration agreements. *See Mitsubishi*, 473 U.S. at 625-27 & 632-38; *McMahon*, 482 U.S. at 229-32. In *McMahon*, this Court observed that such suspicions, which had formed the underpinning for the Court's decision in *Wilko*, had largely been abandoned by the Court's more recent decisions:

> [M]ost of the reasons given in *Wilko* have been rejected subsequently by the Court as a basis for holding claims nonarbitrable. In *Mitsubishi*, for example, we recognized that arbitral tribunals are readily capable of handling the factual and legal complexities of antitrust claims, notwithstanding the absence of judicial instruction and supervision. . . . Likewise, we have concluded that the streamlined procedures of arbitration

> do not entail any consequential restriction on substantive rights. . . . Finally, we have indicated that there is no reason to assume at the outset that arbitrators will not follow the law; although judicial scrutiny of arbitration awards necessarily is limited, such review is sufficient to ensure that arbitrators comply with the requirements of the statute.

482 U.S. at 232 (citations omitted).

That Petitioner's suspicions have no foundation in fact or law in the present case is clear. For instance, no basis exists for *assuming* that arbitration panels selected under the NYSE Arbitration Rules to hear employee-member disputes will be biased in favor of industry employers.[7] In any event, this Court has rejected this assumption as a legitimate basis for denying arbitration of statutory claims. *See Mitsubishi*, 473 U.S. at 634. In *Mitsubishi* the Court observed that the parties and the arbitral body administering the proceeding will have input in the selection of the arbitrator and should be able to ensure bias does not creep into the process. *Id.* Accordingly, the Court stated, "We decline to indulge the presumption that the parties and arbitral body conducting a proceeding will be unable or unwilling to retain competent, conscientious, and impartial arbitrators." *Id.*

Ample checks and balances certainly exist in the NYSE procedures to ferret out potentially biased arbitrators. *See* Rules 608, 609, and 610 of the NYSE Arbitration

---

[7] Although Plaintiff argues that the NYSE Arbitration Rules provide that a panel for an intrafirm dispute will be composed of industry arbitrators, the rules do not contain such a requirement. In fact, employee-member disputes typically are heard by panels consisting of a majority selected from public or non-industry arbitraters. *See* Brief of Amicus Curiae Securities Industry Association at text accompanying note 8.

Rules (App. 9-11). These rules include very detailed disclosure requirements that arbitrators must follow and that will provide facts from which the possible bias of any arbitrator can be assessed.[8] The FAA also provides that bias of an arbitrator is a basis upon which any party may ask a district judge to overturn an arbitrator's award. 9 U.S.C. § 10(b).[9]

Similarly, Petitioner's argument that arbitrators selected under NYSE rules will prove unable to resolve ADEA claims and unable to apply applicable law is unsubstantiated. Here again, the parties and the arbitral authorities will be able to ensure that qualified arbitrators[10] are found to decide the case. *See Mitsubishi*, 473 U.S. at 633-34. Moreover, because the Petitioner can be represented by counsel, Rule 614 (App. 16), counsel can

---

[8] The failure of an arbitrator to make an adequate disclosure of facts relevant to assessing his or her impartiality may be grounds to set aside any award rendered by that arbitrator. *Andros Compania Maritima v. Marc Rich & Co., A.G.*, 579 F.2d 691 (2d Cir. 1978).

[9] Authority also exists that the district court, in enforcing an arbitration agreement under the FAA, may compel the appointment of a neutral arbitrator whenever any legitimate question exists as to the impartiality of the arbitrator(s) provided by the parties' agreement. *See Erving v. Virginia Squires Basketball Club*, 468 F.2d 1064, 1067-68 (2d Cir. 1972).

[10] Really, nothing more would be required than experienced lawyers. Such a choice would ensure that the arbitrators are capable of understanding the basic legal concepts that apply in an ADEA case. *See* Judge Wilkinson's comments below, 895 F.2d at 201 (courts should not be deluded "into thinking that the ultimate question in ADEA cases is of a type which only federal judges are capable of resolving"); *cf. McMahon*, 482 U.S. 239-40 (no reason to suppose RICO claims too complex for arbitral resolution); *Mitsubishi*, 473 U.S. at 633 (potential complexity of statutory antitrust claims not enough to preclude arbitration).

ensure that the legal principles applicable to a particular claim will be adequately presented to the arbitrators. In any event, arbitrators' actions on a particular case are always subject to review. As noted above in *McMahon*, there simply is "no reason *to assume* . . . that arbitrators will not follow the law. . . . " 482 U.S. at 232 (emphasis added). In any event, an arbitrator's imperfect execution of his duties or manifest disregard of applicable law remains a valid reason for a district court, upon reviewing the arbitrator's award, to vacate the arbitrator's decision. *See* discussion *infra* at 24-25.

Arbitration under NYSE rules also provides Petitioner with ample opportunity to develop and present his claim. The NYSE's recently amended rules provide for expanded discovery and are more than sufficient for Petitioner to develop his claim. *See* Rule 619 (App. 17-21). *See also SEC Order Approving Proposed Rule Changes By New York Stock Exchange, Inc., Nat'l Ass'n of Sec. Dealers, Inc., and the American Stock Exchange, Inc., Relating to the Arbitration Process and the Use of Predispute Arbitration Clauses*, 54 Fed. Reg. 21144, 21149-51 [hereinafter cited as *"SEC Order"*]. While Petitioner complains that taking a deposition depends on obtaining an arbitrator's approval, such approval should not be difficult to obtain,[11] particularly where, as in most employment cases, a claimant will likely be able to demonstrate that the evidence sought is

[11] In approving recent revisions to NYSE's discovery rules, the SEC noted that "[t]he SRO's . . . have explicitly recognized the appropriateness of depositions in particular circumstances. Under the proposed rule changes, arbitrators may order depositions when appropriate." *SEC Order*, 54 Fed. Reg. at 21149. It then stated, "The Commission's approval of this portion of the discovery rule is based on our clear understanding that depositions will be available *as a matter of routine* to parties in appropriate cases." *Id.* at 21150 (emphasis added).

pertinent to his claim. In any event, this argument focuses on only one aspect of the arbitration procedure. A proper analysis must focus on the entire procedure and its fairness to the parties, not just upon an isolated discovery procedure.

By the time the arbitration hearing begins, Petitioner also will have received a detailed, written answer from Respondent, who is obligated by the NYSE rules to set forth all relevant facts on which it will rely in defending the claim. Rule 612 (App. 12). Respondent will also have produced, at least ten (10) days before the hearing, all documents it intends to use at the hearing, thereby affording Petitioner ample opportunity to become familiar with those documents and to prepare any needed response. Rule 619(c) (App. 19).

For the hearing, an arbitrator or any counsel may subpoena witnesses to the extent provided by law. Rule 619(f) (App. 20). *See also* 9 U.S.C. § 7 ("The arbitrators selected, . . . or a majority of them may summon in writing any person to attend before them or any of them as a witness and in a proper case to bring with him or them any book, record, document or paper which may be deemed material as evidence in the case."). The arbitrators also may compel attendance by any member employee and/or the production of any records in the possession or control of any member company or its employees. Rule 619(g) (App. 20-21). Because formal evidence rules do not apply, the Petitioner will have considerably more latitude in presenting his claim than might be the case in court. Rule 620 (App. 21).

Although the AARP complains that arbitration will preclude the prosecution of class actions, Brief Amicus Curiae of AARP, at 18, that argument has no bearing on this case. Petitioner's claim has never been anything but

an individual one;[12] thus, the availability or unavailability of a class action has no bearing on whether arbitration is sufficient to resolve his claim.

Petitioner's claim that arbitration will unduly restrict the relief a discrimination claimant can recover also has no merit. The rules impose no limitation on the relief a panel may award Petitioner. Unlike the collective bargaining context found controlling in *Alexander*, in which the arbitrator may be limited to providing only relief allowed by a union contract, the NYSE rules do not restrict arbitrators from fully remedying any violation of law they may find. *Cf.* Rule 627(e) (App. 24).[13]

---

[12] In any event, nothing in the NYSE arbitration rules would preclude a claimant from pursuing even a class action, seeking class-wide relief. At least one commentator has observed that, with some amount of judicial supervision, class arbitrations are feasible. *See* Note, *Classwide Arbitration and 10b-5 Claims In the Wake of Shearson/American Express, Inc. v. McMahon*, 74 Cornell L. Rev. 380, 395-406 (1989). *See also Nicholson v. CPC Internat'l, Inc.*, 877 F.2d 221, 240-41 (3d Cir. 1989) (Becker, J., dissenting) ("arbitrations may in fact go forward as class actions"); *Harv. Note* at 575. NYSE Rules were recently again amended to liberalize procedures for a collective proceeding. *See* 55 Fed. Reg. 38181 (Sept. 17, 1990). In such cases, Rule 612(d) now permits a collective proceeding similar to that available under the ADEA. *Cf.* 29 U.S.C. §§ 626(b) & 216(b).

[13] If that means ordering the elimination of a pattern or practice of discriminatory behavior that adversely affected the Plaintiff, or a class of similarly situated co-claimants, the arbitrators are able to do so under the statute (the ADEA) they will be charged with applying and under the broad equitable powers historically found to reside in arbitrators. *See Nicholson*, 877 F.2d at 240 (Becker, J., dissenting).

(Continued on following page)

Although Petitioner and various amici complain that the record in an arbitration is too cursory to permit an adequate review of the proceeding or of the reasons behind a particular award, their objections do not apply here. Appropriate procedures exist under NYSE Arbitration Rules to ensure a court can adequately review the results of the proceeding. Thus, the rules, as recently amended, require that a verbatim record be maintained. Rule 623 (App. 22).[14] The new rules also require that

---

(Continued from previous page)

Both *Mitsubishi* and *McMahon* also indicate that arbitral forums can provide statutory damages. In each case, the Court held that statutory treble damages could be pursued adequately through arbitration. *McMahon*, 482 U.S. at 242; *Mitsubishi*, 473 U.S. at 635. Petitioner here should likewise be able to pursue his statutory liquidated damages claim in the arbitral forum to the extent he can sustain a claim for a willful violation. Arbitrators certainly have not hesitated to award such punitive amounts in other contexts. *See Willis v. Shearson/American Express, Inc.*, 569 F. Supp. 821, 824 (M.D.N.C. 1983); Siconolfi, *Blow to Brokers: Stock Investors Win More Punitive Awards in Arbitration Cases*, Wall St. J., June 11, 1990, at 1, col. 1. There is no reason for any different rule in the employment context.

Furthermore, a prevailing ADEA claimant could recover his or her costs and attorney's fees following a favorable arbitral award, whether or not granted by the arbitrators. As a prevailing party, the claimant probably could request and receive such an award from the district court at the award-enforcement stage. *Cf. New York Gaslight Club, Inc. v. Carey*, 477 U.S. 54 (1980) (prevailing party in state administrative proceeding entitled to fee award under Title VII).

The FAA, of course, also provides that the district court may vacate [§10(d)] or modify [§11(c)] any incomplete or imperfect award. Those provisions grant the district courts the authority to ensure that a complete remedy is provided.

[14] The SEC Order approving the new rule notes that "the SRO proposals would assure the preservation of a record of

(Continued on following page)

arbitrators issue their award in writing, stating, *inter alia*, the issues resolved and the relief awarded. Rule 627(e) (App. 24). The ability of a district court to review such an award is commensurate with its ability to review a jury verdict. Just as with a jury trial in federal court, NYSE rules do not require preparation of findings of fact and conclusions of law.

Once the matter is brought before a court at the award-enforcement stage, the court can ensure that the Petitioner's statutory rights were given due consideration. The FAA clearly authorizes a district court to ascertain whether the arbitrators ignored applicable law, deprived the parties of a fair hearing, or rendered a decision tainted by bias. 9 U.S.C. § 10. If a court finds such improprieties, the court may vacate the award. This availability of judicial review certainly suffices to ensure that the Petitioner's ADEA rights will not be lost, or even limited, by the arbitral process to which he agreed. The Court recognized as much in *Mitsubishi*. In rejecting concerns that statutory antitrust claims may be lost if confined to an international arbitral forum, the Court observed that

> [h]aving permitted the arbitration to go forward, the national courts of the United States will have the opportunity at the award-enforcement stage to ensure that the legitimate interest in the enforcement of the antitrust laws has been addressed. . . . While the efficacy of the arbitral process requires that substantive review at the award-enforcement stage remain minimal, it would not require intrusive inquiry to ascertain that the tribunal took cognizance of the antitrust claims and actually decided them.

(Continued from previous page)

each arbitration proceeding and therefore facilitate an appropriate court review." *SEC Order*, 54 Fed. Reg. at 21151.

473 U.S. at 638. *See also id.* at 637 n.19 (noting that Court "would have little hesitation" condemning a refusal to apply applicable law as against public policy).

Finally, Petitioner's concerns that arbitration of age claims may retard doctrinal development and impede the role of an ADEA plaintiff as a "private attorney general" also have no merit. Initially, Petitioner ignores the continuing authority of the EEOC to pursue any cases it believes to be in the public interest and to promulgate regulations. Secondly, Petitioner overlooks that by pursuing an ADEA claim, whether in an arbitral or judicial forum, Petitioner and other claimants advance the remedial and deterrent functions of the ADEA. In *Mitsubishi*, the Court rejected similar concerns, noting that "so long as the prospective litigant effectively may vindicate *its* statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function." *Id.* at 637 (emphasis added). The recently amended NYSE rules also assure that awards will be publicized, thus furthering both the deterrent impact a favorable employee award will have on future actions of the particular defendant and other employers and the development of precedent which may guide future decisions. *See* Rule 627(f) (App. 24).

In short, Petitioner's concerns about the adequacy of arbitration as a means of resolving his ADEA claim are nothing more than erroneous speculation. They cannot warrant an across-the-board refusal to enforce arbitration agreements that encompass ADEA or other statutory claims. This Court has repeatedly rejected such assumptions as sufficient to deny enforcement of arbitration agreements as to other statutory rights. Thus, in *McMahon*, the Court, in rejecting *Wilko's* restrictive approach to arbitrations, observed:

> [T]he reasons given in *Wilko* reflect a general suspicion of the desirability of arbitration and

> the competence of the arbitral tribunals – most apply with no greater force to the arbitration of securities disputes than to the arbitration of legal disputes generally.

482 U.S. at 231. The approach should be no different here. The concerns enumerated by Petitioner are best dealt with on a case-by-case basis by judicial review of the particular arbitration in which they truly arise. The mere possibility that such problems may arise, though, is not a proper basis for refusing to give the arbitral process a chance to work, particularly in light of Congress' strong mandate that the courts liberally enforce arbitration agreements.

B. Petitioner's Concerns About The Relative Bargaining Powers Of The Parties Are Not A Proper Basis For Denying Arbitration.

Petitioner argues that enforcement of his arbitration agreement will result in widespread imposition of such agreements on similar claimants, many of whom allegedly may have little or no bargaining power to resist such terms. This argument suffers from the same fault that undermines Petitioner's other arguments: it argues for a per se rule of exclusion when there is no evidence *in this record* that would justify such a ruling.

As one commentator has observed, "[t]raditional contract doctrines rather than a per se rule of unenforceability are the appropriate means of addressing the problem of adhesion contracts." *Harv. Note* at 576. The FAA expressly provides the means for deciding this issue, where it truly arises, on a case-by-case basis. Section 2 of the FAA provides that arbitration agreements are enforceable "save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. Section 4 further provides for a summary jury trial if, in a proceeding to enforce the agreement, it appears that the making

of the agreement is at issue. *Id.* § 4.[15] These provisions thus indicate that a party opposing arbitration on this ground must come forward with evidence as to his or her agreement warranting a denial of enforcement under traditional contract law principles. They are inconsistent with applying per se rules of exclusion.

Mitsubishi and *McMahon* confirm this approach. In *Mitsubishi*, the Court refused to foreclose arbitration on the assumption that contracts generating antitrust disputes are typically contracts of adhesion. The clear thrust of the Court's reasoning was that the party claiming that the arbitration clause is tainted must prove that point. The Court thus stated that "absent such a showing – and none was attempted here – there is no basis for assuming the forum inadequate or its selection unfair." 473 U.S. at 633. Similarly, in *McMahon*, the Court approved the arbitration of 1934 Exchange Act claims, rejecting the allegation that predispute agreements applicable to such claims should be void because "they tend to result from broker overreaching." 482 U.S. at 230, 231. The Court held that such argument, instead, should be raised as a ground for revoking a particular agreement, using "ordinary principles of contract law"; it was not, however, deemed a ground for holding all such contracts void. *Id.* Both decisions thus demonstrate that arguments for invalidating arbitration clauses must be addressed to the facts of each particular case and should not be premised on assumptions about the "type" of claim or "type" of arbitration agreement involved.

---

[15] Under this Court's opinion in *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967), this procedure comes into play only when the validity of the arbitration clause itself is at issue. If the validity of the whole agreement containing the arbitration provision is challenged, that issue must be decided by the arbitrator. *Id.*

When analyzed under this approach, the record in this case reveals no evidence warranting a refusal to enforce the arbitration agreement. In the first place, the arbitration provision was not "forced" on Petitioner by Respondent; rather, Petitioner agreed to arbitration in conjunction with his registration with the NYSE. In that context "the arbitration rule is a reasonable exercise of the self-regulatory power vested in the Exchange, 15 U.S.C. § 78a, *et seq.*, and is not void as adhesive." *Cullen v. Paine, Webber, Jackson & Curtis, Inc.*, 587 F. Supp. 1520, 1523 (N.D. Ga. 1984).

Secondly, the Court should note that Petitioner is an experienced businessman,[16] who long has worked under registration agreements like that containing the arbitration agreement at issue here. (J.A. at 22.) There is no evidence that he was misled into agreeing to arbitrate his employment disputes with Respondent. In fact, his counsel notified the district court that Petitioner was "not alleging any fraud or anything." (J.A. at 42.) Accordingly, the court of appeals correctly noted that Petitioner "has never asserted that his waiver [of the judicial forum] was anything other than knowing and voluntary. . . . " 895 F.2d at 200. When this Court denied certiorari on this question, that ended the issue in this case.

---

[16] These facts thus present a peculiarly strong basis for enforcing the agreement. *See* Waks & Ginsberg, *Arbitrating Executive and Other Employment Disputes: Let's Put a Pin in Gardner-Denver!, reprinted in* Proceedings of New York University's 43rd National Conference on Labor, 62 (Little Brown, to be published December 1990) ("Especially where executive employees are involved, sophistication should be presumed . . . . ").

C. The Fourth Circuit Correctly Ruled That Arbitration Would Not Conflict With The Statutory Enforcement Scheme Established By The ADEA.

Petitioner argues that the ADEA's enforcement framework itself evinces a congressional intent at odds with requiring an age claimant to pursue his claim through arbitration. As the Fourth Circuit correctly held, this argument has no merit. Petitioner points to aspects of the statute such as the role of the EEOC, the role of the courts in deciding ADEA cases, and the availability of a jury trial as indicating that Congress intended these cases to be resolved exclusively through a judicial forum. The court of appeals' thorough analysis of these arguments cogently explains why none of these attributes of the statute show a congressional intent to preclude arbitration of age claims.

The appeals court found no reason to suspect that the EEOC's role would be diminished. Whatever happens here, the EEOC retains its plenary authority to investigate and prosecute appropriate age claims. *See* 29 U.S.C. §§ 626(a) & 211(a). The EEOC is not foreclosed from its statutory role by any determination made in a private arbitration. Thus, submission of Petitioner's ADEA claim to arbitration does not preclude the EEOC from investigating his claim and, similarly, will have no limiting effect on the EEOC's investigation or prosecution of other ADEA claims. Moreover, because the EEOC remains available to act on behalf of an aggrieved employee, an individual age claimant bound by a private arbitration agreement remains free to file charges or complaints with the EEOC, thereby supplementing the Commission's statutory investigative, conciliation and litigation roles. *See generally Harv. Note* at 573-74. Rather than conflicting with arbitration as a means of resolving ADEA claims, the continuing statutory role of the EEOC under the ADEA

provides an additional safety net that may not have been available in other cases where this Court upheld compulsory arbitration of statutory claims.

The jury trial option under the ADEA and the judiciary's role in the Act's enforcement scheme also were properly rejected by the appeals court as evidence of a congressional intent to foreclose compulsory arbitration of Petitioner's age claim. As the appeals court recognized, the option of a jury trial is one that can be freely waived; in no sense is it the exclusive manner of proceeding for resolving an age claim. 895 F.2d at 199, *citing Washington v. New York City Board of Estimate*, 709 F.2d 792, 797-99 (2d Cir. 1983), *cert. denied*, 464 U.S. 1013 (1983); *Scharnhorst v. Independent School Dist. #710*, 686 F.2d 637, 641 (8th Cir. 1982), *cert. denied*, 462 U.S. 1109 (1983). Similarly, the court of appeals recognized that while the ADEA provides for a trial *de novo* in federal court, that provision

> says nothing about Congress' attitude toward arbitration [of age cases]. Unlike either courts or agencies, arbitration is a forum selected by mutual agreement of the parties. Congress' choice of an enforcement scheme in which ADEA suits are brought in a judicial forum simply does not manifest an intention to prevent parties from reaching a private contractual agreement to submit their disputes to arbitration.

895 F.2d at 199.

In this respect, the ADEA's enforcement scheme is no different than those provided for the statutory claims considered in *Mitsubishi*, *McMahon* and *Rodriguez de Quijas*. Each case involved a claim that, by statute, was triable in a federal jury proceeding. Yet, this Court rejected this fact as a reason for denying arbitration of those statutory claims.

Rodriguez de Quijas is particularly compelling in this regard. The 1933 Securities Act, like the ADEA, provides for concurrent jurisdiction in state and federal court. The court found that this jurisdictional flexibility

> would suggest that arbitration agreements which are, "in effect, a specialized kind of forum-selection clause," *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 519, 94 S.Ct. 2449, 2457, 41 L.Ed.2d 270 (1974), should not be prohibited . . . since they, like the provision for concurrent jurisdiction, serve to advance the objective of allowing buyers of securities a broader right to select the forum for resolving disputes, whether it be judicial or otherwise.

109 S.Ct. at 1921.

The same rationale applies to a claim under the ADEA. Not only does the ADEA allow the same flexibility of concurrent jurisdiction in state and federal courts, *see* 29 U.S.C. §§ 626(b) & (c)(1), 216(b), it goes further to express a strong preference for conciliation as a means of resolving disputes under the Act, *id.* § 626(b) & (d). An employee, therefore, clearly has the freedom to choose forums other than federal courts for resolving an age claim by a private agreement. As the appeals court recognized, "Congress clearly did not intend that all ADEA disputes be resolved in federal court; rather, it contemplated a more flexible scheme for the resolution of individual ADEA claims." 895 F.2d at 200.[17] *Compare*

---

[17] Indeed, the ADEA does not state that only a jury can resolve such claims. The fact that a private ADEA plaintiff remains free to settle his claim at any time demonstrates that fact. *Compare* the Court's analysis in *Mitsubishi*:

> And, of course, the antitrust cause of action remains at all times under the control of the individual litigant: no citizen is under an obligation to bring an

(Continued on following page)

section 10(a) of the National Labor Relations Act, 29 U.S.C. § 160(a), where Congress explicitly stated that arbitration agreements cannot preclude the NLRB from deciding unfair labor practice cases.

Apparently realizing that nothing in the existing language of the ADEA precludes arbitration, Petitioner points to a recent legislative proposal, which he contends implicitly establishes that Congress disfavors binding arbitration of such claims. The proposed, but not enacted, Civil Rights Act of 1990 contained a provision encouraging arbitration and other means of alternative dispute resolution "[w]here appropriate and to the extent authorized by law. . . . " Section 18 of the (proposed) Civil Rights Act of 1990, *reprinted in Conf. Rep. On Civil Rights Act of 1990*, H.R. Doc. No. 101-856, 101 Cong., 2d Sess. (1990). If this unenacted legislation is to be given any consideration here, its clear language supports Respondent's position and the appeals court's analysis and ruling in this matter: *i.e.*, under existing law, such claims are arbitrable. Nonetheless, Petitioner argues that a Conference Committee's explanatory statement supports an opposite meaning. That explanation states:

> The Conferees emphasize . . . that the use of alternative dispute resolution mechanisms is intended to supplement, not supplant, *the remedies provided by Title VII*. Thus, for example, the Conferees believe that any agreement to submit disputed issues to arbitration, whether in the context of a collective bargaining agreement or in an employment contract, does not preclude the affected person from seeking relief

---

(Continued from previous page)

> antitrust suit, . . . and the private antitrust plaintiff needs no executive or judicial approval before settling one.

473 U.S. at 636.

> *under the enforcement provisions of Title VII*. This view is consistent with the Supreme Court's interpretation of Title VII in *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974).

Joint Explanatory Statement of the Committee of Conference, reprinted in Conf. Rep. On Civil Rights Act of 1990, H.R. Doc. No. 101-856, 101 Cong., 2d Sess. (1990), at 20 (emphasis added.)

Petitioner's reliance on the Committee's explanatory statement hardly supports his argument against enforcement of his arbitration agreement in this case. In the first place, after-the-fact pronouncements by Congress cannot provide legislative history relevant to divining Congress' intent at the time it passed the ADEA. *See Rogers v. Frito-Lay, Inc.*, 611 F.2d 1074, 1080 (5th Cir. 1980), *cert. denied*, 449 U.S. 889 (1980). Secondly, the explanatory statement conflicts with the plain language of the proposed amendment, which encouraged the use of arbitrations under the civil rights laws *without restriction*. Legislative history that conflicts with unambiguous language in a statutory enactment should not be permitted to change the meaning of the language actually used in the proposed legislation. *See United Air Lines, Inc. v. McMann*, 434 U.S. 192, 199 (1977); *United States v. Oregon*, 366 U.S. 643, 648 (1961). Thirdly, the fact remains that the Civil Rights Act of 1990 never passed. The bill and its accompanying legislative materials thus represent little more than filler-material for the *Congressional Record* at this point.

Perhaps most significantly, though, Petitioner overlooks that the explanatory statement voices an opinion *solely* about the arbitration of Title VII claims. It in no way endeavors to provide an interpretation that would have precluded, or even limited, the arbitration of ADEA claims, even though section 18 of the Conference bill plainly addresses the use of arbitrations, and other means of alternative dispute resolution, in resolving "disputes

arising under *the Acts* amended by this Act." Section 18, Civil Rights Act of 1990 (Conference Committee bill) (emphasis added). The ADEA was one of *"the Acts"* that would have been amended by the Civil Rights Act of 1990. Thus, if anything, the explanatory statement, by its own limitation to Title VII, suggests that arbitration of an ADEA claim is acceptable to the Conference Committee.

Other recent legislation may supply some guidance on Congress' attitude on this subject. Title II of the recently enacted Older Workers Benefits Protection Act ("OWBPA"), Pub. L. 101-433, establishes standards that must be satisfied in order to effectuate a waiver of substantive rights under the ADEA. Although Congress passed this Act at about the same time it considered the proposed Civil Rights Act of 1990, and specifically dealt with the issue of waivers under the ADEA, Congress voiced no concern about the use of binding arbitration to resolve ADEA claims. Notably, although the Fourth Circuit's *Gilmer* decision was published at that point, Congress made no effort to note its disagreement with *Gilmer* anywhere in the text or Committee Reports on the OWBPA. Nowhere in the Act, or the legislative history of that Act, does Congress even address the topic of arbitrations or mandate a judicial forum for such cases. It easily could have done so. Thus, while the OWBPA clearly has only prospective application and no impact on this case, it indicates Congress has no real concern with the Fourth Circuit's decision in this case. *See Harv. Note* at 577 n.71.

That Congress never has endeavored to preclude or limit application of the FAA according to the type of claim involved also is significant. Although the FAA has been amended on several occasions, *see* Pub. L. 91-368, 84 Stat. 693 (1970); Pub. L. 100-702, 102 Stat. 4671 (1988), no subject matter exceptions have been written into the Act. Congress clearly has the power to except certain types of

claims from the FAA. Where it has not done so, reading such exceptions into the Act based on "policy" considerations would run contrary to Congress' clear intention in the FAA that arbitration agreements be liberally enforced. *Compare* the Court's analysis in *Mitsubishi*, 473 U.S. at 639 n.21, where Congress' amendment to the FAA in Pub. L. 91-368, 84 Stat. 692 (9 U.S.C. §§ 201-08), led the Court to observe "Congress did not specify any matters it intended to exclude from its [FAA's] scope." Clearly Congress has not so limited the FAA; thus Congress apparently has been satisfied with the Court's implementation of its "liberal federal policy favoring arbitration agreements." *Moses H. Cone Mem. Hosp.*, 460 U.S. at 24.

D. Alexander, Barrentine, McDonald and Buell Do Not Preclude Arbitration of ADEA Claims.

Lastly, Petitioner argues that the Fourth Circuit's decision conflicts with this Court's earlier decisions in *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974); *Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728 (1981); *McDonald v. City of West Branch*, 466 U.S. 284 (1984); and *Atchison, Topeka and Santa Fe Ry. Co. v. Buell*, 480 U.S. 557 (1987). Petitioner misreads these cases as supporting his argument that his individual ADEA claim cannot be arbitrated.

Alexander, Barrentine, McDonald and *Buell* are obviously distinguishable from the present case in that none of these cases involved the *enforcement* of a written individual agreement to arbitrate that would have encompassed the statutory claims at issue in those cases. *Alexander, Barrentine* and *McDonald* all focused on whether a prior arbitral award was *preclusive* of particular statutory claims. Each decision probably needed to go no further than its recognition that the statutory claims were

not decided in the collective bargaining arbitration that *preceded* the court action. In fact, the Court recognized in each case that the statutory claim could not have been decided by the labor arbitrators, since each arbitrator's authority was clearly limited to interpreting and applying the terms of the various collective bargaining agreements. The issue of preclusion is not presented at all in this case. This case involves only the threshold question of whether the court should enforce an individual arbitration agreement. The issue of preclusion should await completion of the arbitration. The district court then can determine what preclusive effect the award may have vis-a-vis any federal statutory claim. *See Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. at 224 ("there is no reason to require that district courts decline to compel arbitration . . . simply to avoid an infringement of federal interests").[18]

Buell similarly dealt with a different issue than the enforcement of an individual agreement to arbitrate that would have covered the statutory claim. That case resolved whether the Railway Labor Act ("RLA") provided the exclusive remedy for the plaintiff's FELA claim. The Court held that the RLA procedures were not the plaintiff's exclusive remedy. The Court noted that FELA provided the plaintiff with a damages claim for "negligent conduct that is independent of the employer's obligations under its collective bargaining agreements. . . ." 480 U.S. at 565. The "minor dispute" provisions of the RLA, on the other hand, did not address the damages issue presented by the plaintiff's FELA claim. Since the

[18] *Byrd* predates the *Mitsubishi – McMahon – Rodriguez* trilogy and thus does not fully recognize the arbitrability of federal statutory claims as do those subsequent decisions. Nonetheless, it supports the proposition that determinations of preclusive effect ordinarily should await completion of the arbitral proceeding.

RLA did not provide the means to resolve the plaintiff's FELA claim, the Court found no conflict between the RLA and FELA warranting a ruling that the RLA repealed any part of FELA. *Id.* at 566-67. Thus, the Court's holding in *Buell* is limited by the same fact that was sufficient to resolve *Alexander, Barrentine* and *McDonald: i.e.*, because the statutory claim could not be fully resolved by the collective bargaining agreement procedures available to the plaintiff, he was not precluded from pursuing his statutory claim in court.

In this case, Petitioner clearly can present his statutory claim in the arbitral forum and that forum is equipped to resolve the claim. Thus *Alexander, McDonald, Barrentine*, and *Buell*, should not preclude enforcement of the agreement to arbitrate at issue here.

Equally significant in the *Alexander* line of cases is the total absence in those cases of any discussion or consideration of the FAA or the strong public policy favoring enforcement of individual arbitration agreements under the FAA.[19] Petitioner focuses, however, on the fact that *Buell* was decided after *Mitsubishi*, yet still excepted the statutory employment claim at issue in that case from the "minor dispute" provisions of the Railway Labor Act. There is no indication in *Buell*, though, that the FAA's applicability or the congressional policy favoring enforcement of individual arbitration agreements was ever considered. In fact, the Court would not have applied the FAA to the fact situation in *Buell*. Since Buell was a railroad employee, the FAA, and its attendant presumption favoring arbitration, had no applicability. *See* 9

[19] Given that all these cases arose under collective bargaining agreements, and *Buell* and *Barrentine* involved a railroad worker and a transportation worker, the exclusionary provision in section 1 of the FAA likely precluded application of the Act to those cases. *See* discussion in Argument II *infra*.

U.S.C. § 1. In any event, the Court in *Buell* grappled with the issue of whether the RLA implicitly repealed the FELA insofar as employees covered under RLA collective bargaining agreements were concerned. It did not deal with whether a private agreement to arbitrate could be enforced under the FAA, where doing so would in no way preclude pursuit of the statutory claim at issue. Thus, the issue presented in *Buell* provided no basis for the Court to apply or reject the presumption favoring enforcement of arbitration agreements recognized in *Mitsubishi*.

Petitioner's reliance on *Alexander, Barrentine, McDonald* and *Buell* also fails to recognize the collective bargaining context in which those cases arose. Yet, that context obviously played a substantial role in the Court's refusal to find the *prior* arbitrations preclusive in *Alexander, Barrentine* and *McDonald*, and its refusal to find that the statutory arbitration procedure available in *Buell* was the plaintiff's exclusive remedy.

In *Alexander*, for example, the Court observed that "Title VII's purpose and procedures strongly suggest that an individual does not forfeit his private cause of action if he *first* pursues his grievance to final arbitration *under the nondiscrimination clause of a collective-bargaining agreement*." 415 U.S. at 49 (emphasis added). The Court then noted what it perceived as limitations *in collective bargaining arbitration* that precluded such arbitration from providing an effective forum for the vindication of Title VII rights. These limitations included the arbitrator's limited role "[a]s the proctor of the bargain, . . . to effectuate the intent of the parties," *id.* at 53, which provided the arbitrator with "no general authority to invoke public laws that conflict with the bargain between the parties . . . ," *id.*

The Court also observed that the expertise of such arbitrators is limited "to the law of the shop, not the law of the land." *Id.* at 57. And finally, the Court stated that

> [a] further concern is the union's exclusive control over the manner and extent to which an individual grievance is presented. . . . In arbitration, as in the collective-bargaining process, *the interests of the individual employees may be subordinated to the collective interests of all employees in the bargaining unit*. . . . Moreover, harmony of interest between the union and the individual employee cannot always be presumed, especially where a claim of racial discrimination is made.

Id. at 58 n.19 (citations omitted; emphasis added). *See also Barrentine*, 450 U.S. at 735. Such concerns were similarly echoed throughout *Barrentine, McDonald*, and *Buell*.

The present case obviously does not fit within the context of *Alexander* or its progeny. Unlike those cases, the present case does not arise under a collective bargaining agreement. Thus, the Court's concerns in *Alexander* about collective bargaining arbitration do not apply here. Significant distinctions exist between the arbitral procedures to be utilized in Petitioner's arbitration and collective bargaining arbitration. *Compare* NYSE procedures applicable to Petitioner's claim discussed at Argument II. A.2 *supra*. Commentators have observed that the differences between the two models, in large measure, explain why the results in *Alexander, Barrentine*, and *McDonald* differ from those in *Mitsubishi, McMahon* and *Rodriquez*. *See* Sheli, *ERISA and Other Federal Employment Statutes: When Is Commercial Arbitration an "Adequate Substitute" for the Courts?*, 68 Tex. L. Rev. 509, 512-14 (1990); *Harv. Note* at 577-80.

Finally, the *Alexander* line of cases also must be questioned in light of the obvious hostility expressed by those cases towards arbitration as a procedure for resolving

statutory claims. If that hostility is simply a recognition of the limitations inherent in collective bargaining arbitrations, it may have some justification, but it is not germane to this case. On the other hand, to the extent that hostility manifests a broader concern applicable to *all* forms of arbitration, it likely has been eviscerated by this Court's subsequent decisions in the *Mitsubishi – McMahon – Rodriguez de Quijas* line of cases.

E. Summary of Argument

The foregoing discussion establishes that the Fourth Circuit's decision in this case was correct.[20] As the court

---

[20] For these same reasons, Respondent takes issue with those cases relied upon by Petitioner as contrary to the Fourth Circuit's opinion in this case. *E.g., Alford v. Dean Witter Reynolds, Inc.*, 905 F.2d 104 (5th Cir. 1990); *Utley v. Goldman Sachs & Co.*, 883 F.2d 184 (1st Cir. 1989), *cert. denied*, 110 S.Ct. 842 (1990); *Nicholson v. CPC Internat'l, Inc.*, 877 F.2d 221 (3d Cir. 1989); *Swenson v. Management Recruiters Internat'l, Inc.*, 858 F.2d 1304 (8th Cir. 1988), *cert. denied*, 110 S.Ct. 143 (1989). Respondent proffers Judge Becker's dissenting opinion in *Nicholson* and the Fourth Circuit's opinion below as more in line with the approach to arbitrability enunciated by this Court in *Mitsubishi* and *McMahon*. Those opinions give due regard to the congressional purposes underlying the ADEA, while at the same time applying the strong presumptions favoring arbitrability recognized in *Mitsubishi* and *McMahon*. Because each opinion concludes that arbitration will not affect the substantive rights at issue, each reads enforcement of the FAA policy favoring arbitration as consistent, *not* in conflict, with the enforcement of an individual claimant's ADEA rights. This is the better – reasoned approach – giving effect to the purposes underlying both statutes, rather than exalting one to the exclusion of the other. Each opinion also properly recognizes the factual distinctions that make *Alexander, et al.*, inapplicable to cases involving the enforcement of an individual arbitration agreement. A number of other recent cases have been willing to take

(Continued on following page)

below held, Petitioner has demonstrated nothing in the text or legislative history of the ADEA showing a congressional intent to foreclose arbitration of ADEA claims. The appeals court also correctly determined that the arbitration of Petitioner's claims would not pose an inherent conflict with Congress' objectives in passing the ADEA. Petitioner has raised no arguments here that show any error in that conclusion. Lastly, this Court's decisions in *Alexander, Barrentine, McDonald* and *Buell* do not support Petitioner's arguments for reversal. In any event, those cases hinge, at least in part, on an outdated hostility towards arbitration of statutory claims and may warrant clarification, at least to the extent that they may be interpreted as precluding arbitration of all statutory employment claims under individual arbitration agreements.[21]

(Continued from previous page)

this approach, as well. *See, e.g, Pierce v. Shearson Lehman Hutton, Inc.*, 52 Fair Empl. Prac. Cas. (BNA) 1882 (N.D. Ill. 1990) (Conlon, J.) (ADEA claim); *Roe v. Kidder, Peabody & Co.*, 52 Fair Empl. Prac. Cas. (BNA) 1865 (S.D.N.Y. 1990) (Haight, J.) (Title VII and section 1981 claims). *See also Arnulfo P. Sulit, Inc. v. Dean Witter Reynolds, Inc.*, 847 F.2d 475 (8th Cir. 1988) (ERISA claim).

Respondent also disagrees, on the same grounds, with the EEOC's recent policy guidance memorandum addressing the issue in this case. *See* EEOC Notice No. N-915-060 (August 29, 1990). Respondent also questions whether any weight should be accorded the EEOC's interpretation. It obviously was stated long after enactment of the ADEA and seems to have been issued for the Court's consideration in this case.

[21] *See generally* this Court's order of remand in *Shearson Lehman/American Express, Inc. v. Bird*, 110 S.Ct. 225 (1989), *vacating and remanding*, 871 F.2d 292 (2d Cir. 1989). The Second Circuit had held that an ERISA claim was not subject to compulsory arbitration, in large measure because of the importance

(Continued on following page)

II. THE ARBITRATION AGREEMENT APPLICABLE TO PETITIONER'S CLAIMS IS ENFORCEABLE UNDER THE FEDERAL ARBITRATION ACT.

In briefs submitted amicus curiae, the AFL-CIO, AARP and Lawyers Committee for Civil Rights argue that section 1 of the FAA excludes Petitioner's arbitration agreement from the Act's coverage. Section 1 of the FAA states, in pertinent part, that "contracts of employment of seaman, railroad employees, or any other class of workers engaged in foreign or interstate commerce" are not covered by the statute. 9 U.S.C. § 1. According to the aforementioned amici, this provision excludes *all* employment contracts from the coverage of the FAA and thus precludes Respondent from enforcing the arbitration agreement as to Petitioner's claims. This argument is incorrect.

An obvious point overlooked by the amici is the context in which Petitioner's arbitration agreement arose. The arbitration agreement actually arises in Petitioner's registration agreement with the NYSE. In that agreement, he agreed to the constitution, rules and bylaws of the Exchange and agreed to arbitrate any dispute between him and his firm in accordance with the rules, constitution and bylaws of the Exchange. *See* Petitioner's Application for Securities Industry Registration (J.A. at 15-19). Petitioner also executed this provision as a condition of his employment with Respondent, since his registration with the Exchange was necessary to fulfill his duties. The provision thus also became part of his employment contract with Respondent. Affidavit of Franklin C. Golden ¶ 1 (J.A. at 74).

(Continued from previous page)

of the remedial objectives underlying ERISA. This Court remanded *Bird* for reconsideration in light of *Rodriguez de Quijas*.

Petitioner's arbitration agreement is enforceable over and beyond his employment contract with Respondent. The arbitration agreement also is enforceable by Respondent as a contract between Plaintiff, as a registered representative working in the Exchange, the Exchange, and its member companies, that inures to the benefit of Respondent as a member company, just as it would to customers, other Exchange members, and the Exchange. The enforceability of Petitioner's agreement to arbitrate in this regard is no different than the enforceability of any member company's, allied member's, or registered representative's obligations under the Exchange's constitution, rules and bylaws.

It has been stated that "the constitution and rules of a stock exchange constitute a contract between all members of the exchange with each other and with the exchange itself." *Legg, Mason & Co. v. Mackall & Coe, Inc.*, 351 F.Supp. 1367, 1370 (D.D.C. 1972) (citations omitted). This "contract" consists of the very rules and regulations by which the Exchange, as a Self-Regulatory Organization (SRO), governs itself, its members and the employees of the Exchange and its member companies, subject to SEC oversight. The arbitration provision to which Petitioner agreed upon his registration with the Exchange is an important part of this contract of interwoven obligations. It, like the other provisions of the Exchange's constitution, rules and bylaws, "reflects the self-regulation of the securities industry, as well as the effort to provide an integrated method of resolving disputes involving the affairs of the NYSE." *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Hovey*, 726 F.2d 1286, 1289 (8th Cir. 1984). In this respect, the arbitration provision generally is deemed binding on both the employee and his member-employer and enforceable by each. In *Coenen v. R. W. Pressprich &*

Co., 453 F.2d 1209 (2d Cir.), *cert. denied*, 406 U.S. 949 (1972), for example, the court observed:

> Since the rules of the Exchange "constitute a contract between the members, the arbitration provisions which they embody have contractual validity." . . . The Exchange provisions requiring arbitration constitute an agreement to arbitrate which is binding upon both [parties].

453 F.2d at 1211, *quoting Brown v. Gilligan, Will & Co.*, 287 F.Supp. 766, 769-70 (S.D.N.Y. 1968); *accord, e.g., Tullis v. Kohlmeyer & Co.*, 551 F.2d 632, 638 n.8 (5th Cir. 1977); *Cullen v. Paine, Webber, Jackson & Curtis, Inc.*, 587 F.Supp. at 1523 (N.D. Ga. 1984). *See generally Aspero v. Shearson American Express, Inc.*, 768 F.2d 106 (6th Cir. 1985); *Morgan v. Smith Barney, Harris Upham & Co.*, 729 F.2d 1163, 1165 & n.2 – 1166 & n.5 (8th Cir. 1984) (in particular see cases cited at n.4); *Brown v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 664 F. Supp. 969 (E.D. Pa. 1987); *Malison v. Prudential-Bache Secs., Inc.*, 654 F. Supp. 101 (W.D.N.C. 1987), all of which hold such arbitration provisions binding and enforceable in individual disputes between brokerages and their employees or former employees.

To focus on the arbitration agreement at issue here as simply part of Plaintiff's employment contract with Respondent would ignore the larger context in which the agreement truly arises and in which it is enforceable. When viewed instead as part of Plaintiff's commitment to the same contract that governs all members and members' representatives who participate in the SRO's activities, the arbitration provision indisputably fits within the FAA and is enforceable by Respondent under section 2 of that Act. As one court has observed, "[t]here is no doubt that the contract between the parties to arbitrate controversies under the Constitution and Rules of the New York Stock Exchange evidences a 'transaction involving commerce' within the meaning of section 2 of the Act." *Legg,*

Mason & Co., 351 F.Supp. at 1370. Thus, another court has stated, "[t]he principle that an arbitration provision, incorporated by reference into an application to become an allied member of a stock exchange, is enforceable where there has been no fraud in the inducement, is so clearly established that no further discussion is necessary." *O'Neel v. National Ass'n of Sec. Dlrs., Inc.*, 667 F.2d 804, 806 (9th Cir. 1982); *accord, A.G. Edwards & Son, Inc. v. Smith*, 11 Empl. Ben. Coord. (BNA) 2430, 2432 (D. Ariz. 1989) (applying the same principle to registered representative). Respondent therefore submits that the case law emphatically establishes that the section 1 proviso would not preclude arbitration of the present dispute, even if it excluded *all* employment contracts from the FAA's coverage as the amici contend.

In any event, the amici's argument that section 1 excludes all employment contracts overlooks the plain language of the statute. Congress sought only to exclude a particular category of "workers' " agreements from the FAA's coverage – *i.e.*, only "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." *See* 9 U.S.C. § 1. It did not purport to exclude "all" employment contracts.[22] Had Congress intended to write *all* employment contracts out of the FAA, it could very easily have done so; simply stating that "nothing herein contained shall apply to *any* contracts of employment" would have sufficed.

---

[22] The Court previously has observed that Congress "amended . . . the statute to exclude *certain kinds* of employment contracts." *Prima Paint Corp.*, 388 U.S. at 401 n.7 (emphasis added). This description differs significantly from saying that Congress excluded *all* employment contracts.

A review of the legislative history and judicial interpretation of section 1's exclusionary language[23] demonstrates that Congress sought only to exclude those contracts in which organized labor, principally the Seamen's Union, had significant interests in maintaining its influence. Organized labor wanted to ensure it and its members remained free of any efforts by management to force arbitration agreements upon weak unions or individual seamen, and free of judicial directives to honor agreements to arbitrate that might have limited labor from using other forms of economic pressure that might prove more persuasive in a given situation. *See American Postal Workers Union v. United States Postal Serv.*, 823 F.2d 466, 470 (11th Cir. 1987) ("Organized labor, which was already aggrieved by actions of the federal judiciary, did not want federal courts to have the power to order it to arbitrate disputes with management. Accordingly, at the behest of the Seamen's Union, Congress included [the present exclusionary language found in section 1]."). The objections of organized labor to the original language of the FAA that are referenced in the AFL-CIO's and AARP's briefs are limited precisely to these concerns. *See, e.g., Proceedings of the Twenty-Sixth Annual Convention of the International Seamen's Union of America*, 203-04 (1923) (comments of Andrew Furuseth that compulsory arbitration would and seamen's traditional "right to quit work in harbor" and restore slavery); Brief of AFL-CIO, 17-19.

Similarly, in responding to labor's concerns, the principal proponents of the FAA sought to clarify that they had no intention "to make an industrial arbitration" or to

---

[23] Of course, resort to such legislative history and judicial interpretation is hardly necessary to determine that the exclusion does not cover *all* employment contracts as the amici contend; the plain language of the statute shows that fact.

compel arbitration of "labor disputes." *Hearing before a Subcommittee of the Senate Committee on the Judiciary, on S.4213 and S.4214*, 67th Cong., 4th Sess. 9 (1923) (statement of Mr. Piatt). From the context of these statements, one can clearly discern that the proponents of the Act were acknowledging only that they had no intention of compelling arbitration of labor-management disputes. They accordingly deferred to organized labor's objections, principally those expressed by the Seamen's Union, to exclude those categories of contracts within organized labor's area of interest.

In light of the context in which the exclusionary provision was added to the statute, and the choice of words used to describe the subject of the exclusion, it has since become well settled that the exclusionary provision is more limited in scope than the amici have recognized. In *United Elec., R. & M. Workers v. Miller Metal Products*, 215 F.2d 221 (4th Cir. 1954), the Fourth Circuit observed:

> *It appears that the exclusion clause of the Arbitration Act was introduced into the statute to meet an objection of the Seafarers International Union; and certainly such objection was directed at including collective bargaining agreements rather than individual contracts of employment under the provisions of the statute.* The terms of the collective bargaining agreement become terms of the individual contracts of hiring made subject to its provisions and the controversies as to which arbitration would be appropriate arise in almost all instances, not with respect to the individual contracts of hiring, but with respect to the terms engrafted on them by the collective bargaining agreement. It is with respect to the latter that objection arises to the compulsory submission to arbitration which the Arbitration Act envisages. *No one would have serious objection to submitting to arbitration the matters covered by the individual contracts of hiring divorced from the provisions*

grafted on them by the collective bargaining agreements.

Id. at 224 (emphasis added). The Fourth Circuit thus recognized that the proviso to section 1 of the FAA had only a limited purpose – to exclude collective bargaining agreements from the coverage of the Act in light of organized labor's objections.[24] It saw nothing, however, to indicate that individual arbitration agreements were excluded from the Act by section 1.

Other courts also have drawn meaning from Congress' explicit reference to "workers' " contracts and to particular categories of "workers" in the exclusionary provision of the FAA. Thus, in *Tenney Eng. v. United Elec., R. & M. Workers*, 207 F.2d 450 (3rd Cir. 1953), the Third Circuit, in perhaps the seminal case interpreting the exclusionary provision, construed the provision to except only contracts of workers in the enumerated categories or in a similar class of workers moving goods through interstate commerce, and contracts of workers engaged in the transportation industry. Since *Tenney* numerous other courts have found that various categories of employees not fitting the description of "workers engaged in . . . interstate commerce" are not subject to the exclusionary provision. *See, e.g., Stokes v. Merrill Lynch, Pierce, Fenner &*

---

[24] For this same reason, the amici's reference to *United Paperworkers Internat'l Union v. Misco, Inc.*, 484 U.S. 29 (1987) is meaningless. That case arose in the context of collective bargaining agreement arbitration. At most, the Court's observation that the FAA "does not apply to 'contracts of employment of . . . workers engaged in foreign or interstate commerce' " but may provide "guidance in labor arbitration . . . " *id.* at 372 n.9 indicates that the FAA does not control arbitration under collective bargaining agreements. It does not support the argument that all employment contracts are excluded from the FAA, and it clearly has no application to the context in which this case arises.

Smith, Inc., 523 F.2d 433, 436 (6th Cir. 1975) (stock brokerage account executives "do not seriously contend . . . they fall within the exception from coverage in § 1 of the Arbitration Act. . . . "); *Erving v. Virginia Squires Basketball Club*, 468 F.2d 1064 (2d Cir. 1972) (professional athlete); *Dickstein v. duPont*, 443 F.2d 783 (1st Cir. 1971) (stockbroker); *Signal-Stat Corp. v. Local 475, United Elec., R. & M. Workers*, 235 F.2d 298 (2d Cir. 1956), *cert. denied*, 354 U.S. 911 (1957) (production workers under collective bargaining agreement who were not moving goods through commerce or working in an interstate transportation function); *Tonetti v. Shirley*, 173 Cal. App. 3d 1144, 219 Cal. Rptr. 616, 618 (1985) (stockbroker). *See also Bernhardt v. Polygraphic Co. of Amer., Inc.*, 218 F.2d 948, 951-52 (2d Cir. 1955), *rev'd on other grounds*, 350 U.S. 198 (1956) ("Plaintiff was not hired as a 'worker' but as a plant superintendent at a salary of $15,000 a year, with managerial duties fundamentally different from those of 'workers.' ").

On at least one occasion this Court has implicitly recognized that an individual registration agreement like Petitioner executed here is covered by the FAA, section 1's proviso notwithstanding. In *Perry v. Thomas*, 482 U.S. 483 (1987), the Court held that the FAA preempted a state wage payment law that exempted claims under the statute from arbitration. The Court's holding compelled the claimant, who, like Petitioner here, individually had agreed to arbitrate any dispute with his employer as part of his registration application with the NYSE, to arbitrate a wage payment claim. Although the Court did not expressly consider whether employment contracts were excluded from coverage under the FAA by section 1's proviso, it nonetheless read the FAA as preempting a state statutory provision applicable to the plaintiff's claim. In so doing the Court observed that the FAA's

"general applicability reflects that '[t]he preeminent concern of Congress in passing the Act was to enforce *private agreements into which parties had entered.*' . . . " *Id.* at 490, *quoting Byrd*, 470 U.S. at 221 (emphasis added). It seems doubtful the Court would have accorded the FAA such an expansive preemptive effect on the facts of that case if it had not recognized that the FAA applied to individual arbitration agreements like that to which the plaintiff in *Perry* and the Petitioner here were parties.

CONCLUSION

The decision of the Fourth Circuit Court of Appeals should be affirmed. The court properly determined that nothing in the text, legislative history or underlying purposes of the ADEA preclude arbitration as a forum for effectively resolving those claims. Because the arbitration agreement to which Petitioner was a party covered his ADEA claims and was valid and enforceable under the FAA, the court was correct in directing the district court to order Petitioner to arbitration.

Dated this the 19th day of December, 1990.

Respectfully submitted,

*James B. Spears, Jr.
Robert S. Phifer
Haynsworth, Baldwin,
Johnson and Greaves, P.A.
901 West Trade Street, Suite 1050
Charlotte, NC 28202
(704) 342-2588

*Attorneys for Respondent
Interstate/Johnson Lane
Corporation*

*Counsel of Record

APPENDIX

Controversies As to Employment or Termination of Employment

(From Rules of Board of Directors of New York Stock Exchange, Inc.)

Rule 347. Any controversy between a registered representative and any member or member organization arising out of the employment or termination of employment of such registered representative by and with such member or member organization shall be settled by arbitration, at the instance of any such party, in accordance with the arbitration procedure prescribed elsewhere in these rules.

Amendments.

April 17, 1958.

April 3, 1975; effective May 1, 1975

Revised NYSE Arbitration Rules[1]

Arbitration

Rule 600. (a) Any dispute, claim or controversy between a customer or non-member and a member, allied member, member organization and/or associated person arising in connection with the business of such member, allied member, member organization and/or associated person in connection with his activities as an associated person shall be arbitrated under the Constitution and Rules of the New York Stock Exchange, Inc. as provided by any duly executed and enforceable written agreement or upon the demand of the customer or non-member.

---

[1] *See* Note at end of Appendix.

(b) Under this Code, the New York Stock Exchange, Inc. shall have the right to decline the use of its arbitration facilities in any dispute, claim or controversy, where – having due regard for the purposes of the New York Stock Exchange, Inc. and the intent of this Code – such dispute, claim or controversy is not a proper subject matter for arbitration.

Simplified Arbitration

Rule 601. (a) Any dispute, claim or controversy, arising between a public customer(s) and an associated person or a member subject to arbitration under this code involving a dollar amount not exceeding $5,000, exclusive of attendant costs and interest, shall upon demand of the customer(s) or by written consent of the parties, be arbitrated as herein after provided.

(b) The Claimant shall file with the Director of Arbitration an executed Submission Agreement and a copy of the Statement of Claim of the controversy in dispute and the required deposit, together with documents in support of the Claim. Sufficient copies of the Submission Agreement and the Statement of Claim and supporting documents shall be provided to the Director of Arbitration for each party and the arbitrator. The Statement of Claim shall specify the relevant facts, the remedies sought and whether or not a hearing is demanded.

(c) The claimant shall pay the sum of $15.00 if the amount in controversy is $1,000 or less, $25.00 if the amount is more than $1,000 but $2,500 or less, or $100 if the amount in controversy is more than $2,500, but does

not exceed $5,000 upon filing of the Submission Agreement. The final disposition of this sum shall be determined by the arbitrator.

(d) The Director of Arbitration shall endeavor to serve promptly, by mail or otherwise, on the Respondent(s) one (1) copy of the Submission Agreement and one (1) copy of the Statement of Claim. Within twenty (20) calendar days from receipt of the Statement of Claim, Respondent(s) shall serve each party with an executed Submission Agreement and a copy of Respondent's Answer. Respondent's executed Submission Agreement and Answer shall also be filed with the Director of Arbitration with sufficient additional copies for the arbitrator(s) along with any deposit required under the schedule of fees for customer disputes. The Answer shall designate all available defenses to the Claim and may set forth any related Counterclaim and/or related Third Party Claim the Respondent(s) may have against the Claimant or any other person. If the Respondent(s) has interposed a Third Party Claim, the Respondent(s) shall serve the Third Party Respondent with an executed Submission Agreement, a copy of Respondent's Answer containing the Third Party Claim and a copy of the original Claim filed by the Claimant. The Third Party Respondent shall respond in the manner herein provided for response to the Claim. If the Respondent(s) files a related Counterclaim exceeding $5,000, the arbitrator may refer the claim, counterclaim and/or Third Party Claim, if any, to a panel of three (3) or five (5) arbitrators in accordance with Rule 607 of this Code or, he may dismiss the Counterclaim and/or Third Party Claim without prejudice to the Counterclaimant(s) and/or Third Party Claimant(s) pursuing

the counterclaim and/or Third Party Claim in a separate proceeding. The costs to the Claimant under either proceeding shall in no event exceed $200.

(e) All parties shall serve promptly by mail or otherwise on all other parties and the Director of Arbitration, with sufficient additional copies for the arbitrators, a copy of the Answer, Counterclaim, Third Party Claim, amended claim or other responsive pleading, if any. The claimant, if a Counterclaim is asserted against him, shall within ten (10) calendar days either:

(i) Serve on each party and on the Director of Arbitration with sufficient additional copies for the arbitrator(s) a reply to any counterclaim, or

(ii) if the amount of the Counterclaim exceeds the Claim, have the right to file a statement withdrawing the Claim. If the Claimant withdraws the Claim, the proceedings will be discontinued without prejudice to the rights of the parties.

(f) The dispute, claim or controversy shall be submitted to a single arbitrator knowledgeable in the securities industry selected by the Director of Arbitration. Unless the public customer demands or consents to a hearing, or the arbitrator(s) calls a hearing, the arbitrator shall decide the dispute, claim or controversy solely upon the pleadings and evidence filed by the parties. If a hearing is necessary, such hearing shall be held as soon as practicable at a locale selected by the Director of Arbitration.

(g) The Director of Arbitration may grant extensions of time to file any pleading upon a showing of good cause.

(h) The arbitrator shall be authorized to require the submission of further documentary evidence as he, in his sole discretion, deems advisable.

(i) Upon the request of the arbitrator, the Director of Arbitration shall appoint two (2) additional arbitrators to the panel which shall decide the matter in controversy.

(j) In any case where there is more than one (1) arbitrator, the majority will be public arbitrators.

(k) In his discretion, the arbitrator may, at the request of any party, permit such party to submit additional documentation relating to the pleadings.

(l) Except as otherwise provided herein, the general arbitration rules of the New York Stock Exchange, Inc. shall be applicable to proceedings instituted under this Code.

Amendment.

December 6, 1984.

May 10, 1989.

Hearing Requirements – Waiver of Hearing

Rule 602. (a) Any dispute, claim or controversy, except as provided in Section 2 (Simplified Arbitration), shall require a hearing unless all parties waive such hearing in writing and request that the matter be resolved solely upon the pleadings and documentary evidence.

(b) Notwithstanding a written waiver of a hearing by the parties, a majority of the arbitrators may call for and conduct a hearing. In addition, any arbitrator may request the submission of further evidence.

Time Limitation Upon Submission

Rule 603. No dispute, claim or controversy shall be eligible for submission to arbitration under this Code where six (6) years shall have elapsed from the occurrence or event giving rise to the act or the dispute, claim or controversy. This section shall not extend applicable statutes of limitations, nor shall it apply to any case which is directed to arbitration by a court of competent jurisdiction.

Amendment.

December 6, 1984.

Dismissal of Proceedings

Rule 604. At any time during the course of an arbitration, the arbitrators may either upon their own initiative or at the request of a party, dismiss the proceeding and refer the parties to the remedies provided by law. The arbitrators shall upon the joint request of the parties dismiss the proceedings.

Settlements

Rule 605. All settlements upon any matter submitted shall be at the election of the parties.

Tolling of time Limitation(s) for the Institution of Legal Proceedings and Extension of Time Limitation(s) for Submission to Arbitration

Rule 606. (a) Where permitted by law, the time limitation(s) which would otherwise run or accrue for the institution of legal proceedings, shall be tolled when a duly executed Submission Agreement is filed by the claimant(s). The tolling shall continue for such period as the New York Stock Exchange, Inc. shall retain jurisdiction upon the matter submitted.

(b) The six (6)-year time limitation upon submission to arbitration shall not apply when the parties have submitted the dispute, claim or controversy to a court of competent jurisdiction. The six (6)-year time limitation shall not run for such period as the court shall retain jurisdiction upon the matter submitted.

Amendment.

December 6, 1984.

Designation of Number of Arbitrators

Rule 607. (a) Public Controversies

(1) In all arbitration matters involving public customers and other non-members where the amount in controversy is $500,000 or more, the Director of Arbitration shall appoint an arbitration panel which shall consist of five (5) arbitrators unless the parties agree in writing to a panel of three (3) arbitrators, at least a majority of whom shall not be from the securities industry, unless the public customer or non-member requests a panel consisting of at least a majority from the securities industry.

(2) An arbitrator will be deemed as being from the securities industry if he or she:

1. is a person associated with a member, broker/dealer, government securities dealer, municipal securities dealer, or registered investment adviser, or

2. has been associated with any of the above within the past five (5) years or

3. is retired from or spent a substantial part of his or her business career in any of the above, or

4. is an attorney, accountant or other professional who devoted twenty (20) percent or more of his or her professional work effort to securities industry clients within the last two (2) Years.

(3) An arbitrator who is not from the securities industry shall be deemed a public arbitrator. A person will not be classified as a public arbitrator if he or she has a spouse or other member of the household who is a person associated with a registered broker, dealer, municipal securities dealer, government securities broker, government securities dealer or investment adviser.

(b) Composition of Panels

The individuals who shall serve on a particular arbitration panel shall be determined by the Director of Arbitration. The Director of Arbitration may name the chairman of each panel.

Amended.

June 18, 1986.

May 10, 1989.

Notice of Selection of Arbitrators

Rule 608. The Director of Arbitration shall inform the parties of the names and employment histories of the arbitrators for the past ten (10) years, as well as information disclosed pursuant to Rule 610, at least eight (8) business days prior to the date fixed for the initial hearing session. A party may make further inquiry of the Director of Arbitration concerning an arbitrator's background. In the event that any arbitrator, after appointment and prior to the first hearing session, should resign, die, withdraw, be disqualified or otherwise be unable to perform as an arbitrator, the Director of Arbitration shall appoint a new member to the panel to fill any vacancy. The Director of Arbitration shall inform the parties of the name and employment history of the replacement arbitrator for the past ten years, as well as information disclosed pursuant to Rule 610, as soon as possible. A party may make further inquiry of the Director of Arbitration concerning the background of the replacement arbitrator and within the time remaining prior to the first hearing session or the five (5) day period provided under Rule 609, whichever is shorter, may exercise its right to challenge the replacement arbitrator as provided in Rule 609.

Amended.

May 10, 1989.

Peremptory Challenge

Rule 609. In any arbitration proceeding, each party shall have the right to one peremptory challenge. In

arbitrations where there are multiple claimants, respondents and/or third party respondents, the claimants shall have one peremptory challenge, the respondents shall have one peremptory challenge and the third party respondents shall have one peremptory challenge, unless the Director of Arbitration determines that the interests of justice would best be served by awarding additional peremptory challenges. Unless extended by the Director of Arbitration, a party wishing to exercise a peremptory challenge must do so by notifying the Director of Arbitration in writing within five (5) business days of notification of the identity of the persons named to the panel. There shall be unlimited challenges for cause.

Amendments.

December 6, 1984.

Disclosures Required of Arbitrators

Rule 610. (a) Each arbitrator shall be required to disclose to the Director of Arbitration any circumstances which might preclude such arbitrator from rendering an objective and impartial determination. Each arbitrator shall disclose:

(1) Any direct or indirect financial or personal interest in the outcome of the arbitration;

(2) Any existing or past financial business, professional, family or social relationships that are likely to affect impartiality or might reasonably create an appearance of partiality of bias. Persons requested to serve as arbitrators should disclose any such relationships which they personally have with any party or its counsel, or with any individual whom they have been told

will be a witness. They should also disclose any such relationship involving members of their families or their current employers, partners or business associates.

(b) Persons who are requested to accept appointment as arbitrator should make a reasonable effort to inform themselves of any interests or relationships described in Paragraph (a) above.

(c) The obligation to disclose interests, relationships, or circumstances that might preclude an arbitrator from rendering an objective and impartial determination described in subsection (a) hereof is a continuing duty that requires a person who accepts appointment as an arbitrator to disclose, at any stage of the arbitration, any such interests, relationships, or circumstances that arise, or are recalled or discovered.

(d) Prior to the commencement of the first hearing session, the Director of Arbitration may remove an arbitrator based on information disclosed pursuant to this section. The Director of Arbitration shall also inform the parties of any information disclosed pursuant to this section, if the arbitrator who disclosed the information is not removed.

Amended.

May 10, 1989.

Disqualification or Other Disability of Arbitrators

Rule 611. In the event that any arbitrator, after the commencement of the first hearing session and prior to the rendition of the award, should resign, die, withdraw,

be disqualified or otherwise be unable to perform as an arbitrator, the remaining arbitrator(s) may continue with the hearing and determination of the controversy, unless such continuation is objected to by any party within five (5) days of notification of the vacancy on the panel. Upon rejection, the Director of Arbitration shall appoint a new member to the panel to fill any vacancy. The Director of Arbitration shall inform the parties as soon as possible of the name and employment history for the past ten (10) years of the replacement arbitrator, as well as information disclosed pursuant to Rule 610. A party may make further inquiry of the Director of Arbitration concerning the replacement arbitrator's background and within the time remaining prior to the next scheduled hearing session or the five (5) day period provided under Rule 609, whichever is shorter, may exercise its right to challenge the replacement arbitrator as provided in Rule 609.

Amended.

May 10, 1989.

Initiation of Proceedings

Rule 612. Except as otherwise provided herein, an arbitration proceeding under this Code shall be instituted as follows:

(a) Statement of Claim

The Claimant shall file with the Director of Arbitration three (3) executed copies of the Submission Agreement and an executed Submission Agreement, a Statement of Claim together with documents in support of the claim and the required deposit. Sufficient additional copies of the Submission Agreement and the Statement of

Claim and supporting documents shall be provided to the Director of Arbitration for each party and each arbitrator. The Statement of Claim should specify the relevant facts and the remedies sought. The Director of Arbitration shall endeavor to serve promptly by mail or otherwise on the Respondent(s) one (1) copy of the Submission Agreement and one (1) copy of the Statement of Claim.

(b) Service and Filing with the Director of Arbitration

For purposes of the Code of Arbitration Procedure, service may be effected by mail or other means of delivery. Service and filing are accomplished on the date of mailing either by first-class postage prepaid or by means of overnight mail service or, in the case of other means of service, on the date of delivery. Filing with the Director of Arbitration shall be made on the same date as service.

(c) Answer, Defenses, Counterclaims and/or Cross-Claims

(1) Within twenty (20) business days from receipt of the Statement of Claim, the Respondent(s) shall serve each party with an executed Submission Agreement and a copy of Respondent(s) Answer. An executed Submission Agreement and Answer of the Respondent(s) shall also be filed with the Director of Arbitration with sufficient additional copies for the arbitrator(s), along with any deposit required under the schedule of fees. The Answer shall specify all available defenses and the relevant facts that will be relied upon at hearing and may set forth any related Counterclaim the Respondent(s) may have against the Claimant, any Cross-Claim the Respondent(s) may have against any other named Respondent(s) and any Third Party Claim against any other party or person based

upon any existing dispute, claim or controversy subject to arbitration under this Code.

(2)(i) A Respondent, Responding Claimant, Cross-Claimant, Cross-Respondent or Third Party Respondent who pleads only a general denial as an answer may, upon objection by a party, in the discretion of the arbitrators, be barred from presenting any facts or defenses at the time of the hearing.

(ii) A Respondent, Responding Claimant, Cross-Claimant, Cross-Respondent or Third Party Respondent who fails to specify all available defenses and relevant facts in such party's answer, may, upon objection by a party, in the discretion of the arbitrators, be barred from presenting such facts or defenses not included in such party's answer at the hearing.

(iii) A Respondent, Responding Claimant, Cross-Claimant, Cross-Respondent or Third Party Respondent who fails to file an answer within twenty (20) business days from receipt of service, or unless the time to answer has been extended pursuant to paragraph (5), may, in the discretion of the arbitrators, be barred from presenting any matter, arguments or defenses at the hearing.

(3) Respondent(s) shall serve each party with a copy of any Third Party Claim. The Third Party Claim shall also be filed with the Director of Arbitration with sufficient additional copies for the arbitrator(s), along with any deposit required under the schedule of fees. Third Party Respondent(s) shall respond in the manner provided for response to the claim, as provided in (1) and (2) above.

(4) The Claimant shall serve each party with a reply to a counterclaim within ten (10) business days of receipt of an Answer containing a

Counterclaim. The reply shall also be filed with the Director of Arbitration with sufficient additional copies for the arbitrator(s).

(5) The Director of Arbitration may extend any time period in this section whether such be denominated as a Claim, Answer, Counterclaim, Cross-Claim, Reply or Third Party pleading.

(d) Joining and Consolidation – Multiple Parties

(1) With respect to any dispute, claim or controversy submitted to arbitration, any party or person eligible to submit a claim under this Code shall have the right to proceed in the same arbitration against any other party or person upon any claim directly related to such dispute.

(2) For purposes of this subsection, the Director of Arbitration shall be authorized to determine preliminarily whether a claim is directly related to the matter in dispute and to join any other party to the dispute and to consolidate the matter for hearing and award purposes. In arbitrations where there are multiple claimants, respondents and/or third party respondents, the Director of Arbitration shall be authorized to determine preliminarily whether such parties should proceed in the same or separate arbitrations.

(3) All final determinations with respect to joining, consolidation and multiple parties under this subsection shall be made by the arbitration panel.

Amendments.

December 6, 1984.

June 18, 1986.

May 10, 1989.

Designation of Time and Place of Hearings

Rule 613. Unless the law directs otherwise, the time and place for the initial hearing shall be determined by the Director of Arbitration and each hearing thereafter by the arbitrators. Notice of the time and place for the initial hearing shall be given at least eight (8) business days prior to the date fixed for the hearing by personal service, registered or certified mail to each of the parties unless the parties shall, by their mutual consent, waive the notice provisions under this section. Notice for each hearing, thereafter, shall be given as the arbitrators may determine. Attendance at a hearing waives notice thereof.

Representation by Counsel

Rule 614. All parties shall have the right to representation by counsel at any stage of the proceedings.

Attendance at Hearings

Rule 615. The attendance or presence of all persons at hearings including witnesses shall be determined by the arbitrators. However, all parties to the arbitration and their counsel shall be entitled to attend all hearings.

Failure to Appear

Rule 616. If any of the parties, after due notice, fails to appear at a hearing or any adjourned hearing session, the arbitrators may, in their discretion, proceed with the arbitration of the controversy. In such cases, all awards shall be rendered as if each party had entered an appearance in the matter submitted.

Adjournments

Rule 617. (a) The arbitrators may, in their discretion, adjourn any hearing(s) either upon their own initiative or upon the request of any party to the arbitration.

(b) A party requesting an adjournment after arbitrators have been appointed, if said adjournment is granted, shall pay a fee equal to the deposit of costs but not more than $100. The arbitrators may waive this fee or in their awards may direct the return of this adjournment fee. This provision shall not apply to cases filed pursuant to Rule 601.

Amendment.
June 18, 1986.

Acknowledgement of Pleadings

Rule 618. The arbitrators shall acknowledge to all parties present that they have read the pleadings filed by the parties.

General Provisions Governing Pre-Hearing Proceeding

Rule 619. (a) Requests for Documents and Information

The parties shall cooperate to the fullest extent practicable in the voluntary exchange of documents and information to expedite the arbitration. Any request for documents or other information should be specific, relate to the matter in controversy, and afford the party to whom the request is made a reasonable period of time to

respond without interfering with the time set for the hearing.

(b) Document Production and Information Exchange

(1) Any party may serve a written request for information or documents ("information request") upon another party twenty (20) business days or more after services of the Statement of Claim by the Director of Arbitration or upon filing of the Answer, whichever is earlier. The requesting party shall serve the information request on all parties and file a copy with the Director of Arbitration. The parties shall endeavor to resolve disputes regarding an information request prior to serving any objection to the request. Such efforts shall set forth in the objection.

(2) Unless a greater time is allowed by the requesting party, information requests shall be satisfied or objected to within thirty (30) calendar days from the date of service. Any objection to an information request shall be served by the objecting party on all parties and filed with the Director of Arbitration.

(3) Any response to objections to an information request shall be served on all parties and filed with the Director of Arbitration within ten (10) calendar days of receipt of the objection.

(4) Upon written request of a party whose information request is unsatisfied, the matter will be referred by the Director of Arbitration to either a pre-hearing conference under paragraph (d) of this section or to a selected arbitrator under paragraph (e) of this section.

(c) Pre-Hearing Exchange

At least ten (10) calendar days prior to the first scheduled hearing date, all parties shall serve on each other copies of documents in their possession that they intend to present at the hearing and identify witnesses they intend to present at the hearing. The arbitrator(s) may exclude from the arbitration, any document not exchanged or witnesses not identified at that time. This paragraph does not require service of copies of documents or identification of witnesses which parties may use for cross-examination or rebuttal.

(d) Pre-Hearing Conference

(1) Upon the written request of a party, an arbitration, or at the discretion of the Director of Arbitration, a pre-hearing conference shall be scheduled. The Director of Arbitration shall set the time and place of a pre-hearing conference and appoint a person to preside. The pre-hearing conference may be held by telephone conference call. The presiding person shall seek to achieve agreement among the parties on any issues that relate to the pre-hearing process or to the hearing, including but not limited to, the exchange of information, exchange or production of documents, identification of witnesses, identification and exchange of hearing documents, stipulations of fact, identification and briefing of contested issues, and any other matter which will expedite the arbitration proceedings.

(2) Any issues raised at the pre-hearing conference that are not resolved may be referred by the Director of Arbitration to a single member of the Arbitration Panel for decision.

(e) Decisions by Selected Arbitrator

The Director of Arbitration may appoint a single member of the Arbitration Panel to decide all unresolved issues referred to under this section. Such arbitrator shall be authorized to act on behalf of the panel to issue subpoenas, direct appearances of witnesses and production of documents, set deadlines and issue any other ruling which will expedite the Arbitration proceeding or is necessary to permit any party to develop fully its case. Decisions under this paragraph shall be made upon the papers submitted by the parties, unless the arbitrator calls a hearing. The Arbitrator may elect to refer any issue under this paragraph.

(f) Subpoenas

The arbitrator(s) and any counsel of record to the proceedings shall have the power of the subpoena process as provided by law. All parties shall be given a copy of the subpoena upon its issuance. The parties shall produce witnesses and present proofs to the fullest extent possible without resort to the subpoena process.

(g) Power to Direct Appearance and Production of Documents

The arbitrator(s) shall be empowered without resort to the subpoena process to direct the appearance of any person employed or associated with any member or member organization of the New York Stock Exchange, Inc. and/or the production of any records in the possession or control of such persons or members. Unless the arbitrator(s) direct otherwise, the party requesting the appearance of a person or the production of documents

under this section shall bear all reasonable costs of such appearance and/or production.

Amended.

May 10, 1989.

Evidence

Rule 620. The arbitrators shall determine the materiality and relevance of any evidence proffered and shall not be bound by rules governing the admissibility of evidence.

Renumbered.

May 10, 1989.

Interpretation of Code

Rule 621. The arbitrators shall be empowered to interpret and determine the applicability of all provisions under this Code which interpretation shall be final and binding upon the parties.

Renumbered.

May 10, 1989.

Determinations of Arbitrators

Rule 622. All rulings and determinations of the panel shall be by a majority of the arbitrators.

Renumbered.

May 10, 1989

Record of Proceedings

Rule 623. A verbatim record by stenographic reporter or tape recording of all arbitration hearings shall be kept. If a party or parties to a dispute elect to have the record transcribed, the cost of such transcription shall be borne by the party or parties making the request unless the arbitrators direct otherwise. The arbitrators may also direct that the record be transcribed. If the record is transcribed at the request of any party, a copy shall be provided to the arbitrators.

Amended.

May 10, 1989.

Oaths of the Arbitrators and Witnesses

Rule 624. Prior to the commencement of the first session, an oath or affirmation shall be administered to the arbitrators. All testimony shall be under oath or affirmation.

Renumbered.

May 10, 1989.

Amendments

Rule 625. (a) After the filing of any pleadings, if a party desires to file a new or different pleading, such change must be made in writing and filed with the Director of Arbitration. The Director of Arbitration shall endeavor to serve promptly by mail or otherwise upon all other parties a copy of said change. The other parties may, within ten (10) business days from the receipt of service, file a response with the Director of Arbitration.

(b) After a panel has been appointed, no new or different pleading may be filed except for a responsive pleading as provided for in (a) above or with the panel's consent.

Amendment.

December 6, 1984.

Renumbered.

May 10, 1989.

Reopening of Hearings

Rule 626. Where permitted by law, the hearings may be reopened by the arbitrators on their own motion or in the discretion of the arbitrators upon application of a party at any time before the award is rendered.

Renumbered.

May 10, 1989.

Awards

Rule 627. (a) All awards shall be in writing and signed by a majority of the arbitrators or in such manner as is required by law. Such awards may be entered as a judgment in any court of competent jurisdiction.

(b) Unless the law directs otherwise, all awards rendered pursuant to this Code shall be deemed final and not subject to review or appeal.

(c) The Director of Arbitration shall endeavor to serve a copy of the award: (i) by registered or certified

mail upon all parties, or their counsel, at the address of record; or, (ii) by personally serving the award upon the parties; or, (iii) by filing or delivering the award in such manner as may be authorized by law.

(d) The arbitrator(s) shall endeavor to render an award within thirty (30) days from the date the record is closed.

(e) The award shall contain the names of the parties, a summary of the issues in controversy, the damages and/or other relief requested, the damage and/or other relief award, a statement of any other issues resolved, the names of the arbitrators, the dates the claim was filed and the award rendered, the number and dates of hearing sessions, the location of the hearing, and the signatures of the arbitrators concurring in the award.

(f) The awards shall be made publicly available, provided however, that the name of the customer party to the arbitration will not be publicly available if he or she so requests in writing.

Amended.

May 10, 1989.

Miscellaneous

Rule 628. This Code shall be deemed a part of and incorporated by reference in every duly-executed Submission Agreement which shall be binding on all parties.

Renumbered.

May 10, 1989.

Schedule of Fees

Rule 629. (a) At the time of filing a Claim, Counterclaim, Third-Party Claim or Cross-Claim, a Claimant shall deposit with the New York Stock Exchange, Inc. the amount indicated below unless such deposit is specifically waived by the Director of Arbitration.

Amount in Dispute (Exclusive of interest and expenses)	*Deposit*
$1,000 or less	$ 15
Above $1,000–but not exceeding $2,500	25
Above $2,500–but not exceeding $5,000	100
Above $5,000–but not exceeding $10,000	200
Above $10,000–but not exceeding $50,000	400
Above $50,000–but not exceeding $100,000	500
Above $100,000–but not exceeding $500,000	750
Above $500,000	$1,000

Where the amount in dispute is $10,000 or less, no additional deposits shall be required despite the number of hearing sessions. Where the amount in dispute is above $10,000 and multiple hearing sessions are required, the arbitrators may require any of the parties to make additional deposit for each additional hearing session. In no event shall the aggregate amount deposited per hearing session exceed the amount of the initial deposit as set forth in the above schedule.

(b) A hearing session is any meeting between the parties and the arbitrator(s), including a pre-hearing conference, which lasts four (4) hours or less.

(c) The arbitrators, in their awards, may determine the amount chargeable to the parties as forum fees (fees) and shall determine by whom such fees shall be borne. Where the amount in dispute is $10,000 or less, total fees

to the parties shall not exceed the amount of the total initial deposit deposited by the parties, regardless of the number of hearing sessions conducted. Where the amount in dispute is above $10,000, total fees chargeable to the parties per hearing session may equal but shall not exceed the amount of the total initial deposit(s) deposited by the parties. Amounts deposited by a party shall be applied against fees, if any. If the fees are not assessed against a party who has made a deposit, the deposit will be refunded. In addition to forum fees, the arbitrator(s) may determine in their awards the amount of costs incurred pursuant to Rules 617, 619 and 624, and unless applicable law directs otherwise, other costs and expenses of the parties and arbitrator(s) that are within the scope of the agreement of the parties or are otherwise permitted by law. The arbitrator(s) shall determine by whom such costs shall be borne.

(d) If the dispute, claim or controversy does not involve or disclose a money claim, the amount to be deposited by the Claimant shall be $100, or such amount as the director of arbitration or the panel of arbitrators may require but shall not exceed $1,000.

(e) Any matter submitted and thereafter settled or withdrawn prior to the commencement of the first session shall entitle the parties to a refund of all but $25 of the amount deposited with the New York Stock Exchange, Inc.

(f) Any matter submitted and thereafter settled or withdrawn subsequent to the commencement of the first session may be subject to such refund of assessed

deposits, if any, as the New York Stock Exchange, Inc. may determine.

(g) The arbitrators may assess forum fees and costs incurred pursuant to Rules 617, 619 and 623 in any matter settled or withdrawn subsequent to the commencement of the first session.

(h) The fees for a pre-hearing conference with an arbitrator shall be seventy-five (75%) per cent of the fees contained in subsection (a).

Amendment.

December 6, 1984.

May 20, 1987.

May 10, 1989.

Uniform Arbitration Code

Rule 630. The provisions of the Uniform Arbitration Code contained in Rules 600 through 630 shall also apply to controversies between members, allied members, member firms, member organizations and/or nonmembers who are not public customers, except insofar as such provisions specifically apply to matters involving public customers.

Amendment.

June 18, 1986.

Renumbered.

May 10, 1989.

Schedule for Member Controversies

Rule 631. At the time of filing a Submission Agreement, a Claimant shall deposit with the New York Stock Exchange, Inc. the amount indicated below:

	Deposit Per Hearing
$5000 or less	$200*
$5000 or more but less than $100,000	$750
$100,000 or more	$1,000

Where the controversy does not involve a money claim, the costs and the amount to be deposited shall be such amount as may be fixed in advance by the Exchange, except that such amount shall not exceed $1,000 per hearing.

When the controversy is resolved in any way other than by arbitration award, the Exchange shall retain $25.

Amendment.

May 20, 1987.

Renumbered.

May 10, 1989.

Member Controversies

Rule 632. Any controversy between parties who are members, allied members, member firms or member corporations shall be submitted for arbitration to members of the Board of Arbitration, unless non-members are also

---

* This shall also be the fee for non-member claimants who are not public customers.

parties to the controversy. If the amount (exclusive of interest and costs) involved in the controversy is less than $10,000 the controversy shall be heard by one arbitrator. If such amount is $10,000 or more the controversy shall be heard by at least three but not more than five arbitrators. If nonmembers are also parties to such controversies, the arbitrators shall be appointed in accordance with Rule 607 unless the non-member(s) consent to arbitration before members of the Board of Arbitration.

Adopted.

November 30, 1983.

Amendment.

June 18, 1986.

Renumbered.

May 10, 1989.

Filing Fee for Member Non-Member Controversies

Rule 633. A member organization shall, when filing a claim against a nonmember, pay a non-refundable filing fee of $500. This fee shall be an addition to all other fees, deposits or costs which may be required.

Adopted.

December 6, 1984.

Renumbered.

May 10, 1989.

Board of Arbitration

Rule 634. Promptly after the annual election of the Exchange, the Chairman of the Board of Directors shall appoint, subject to the approval of the Board of Directors, a Board of Arbitration to be composed of such number of present or former members, allied members and officers of member corporations of the Exchange who are not members of the Board of Directors as the Chairman of the Board of Directors shall deem necessary to serve at the pleasure of the Board of Directors or until the next annual election of the Exchange and their successors are appointed and take office.

Adopted.

May 20, 1987.

Renumbered

May 10, 1989.

Panel of Arbitrators

Rule 635. The Chairman of the Board of Directors shall from time to time appoint two panels of arbitrators, composed of persons who are residents of or have their places of business in the Metropolitan area of the City of New York. The first of such panels shall be composed of persons engaged in or retired from the securities business and the second of such panels shall be composed of persons not engaged in the securities business. The Chairman of the Board of Directors may likewise appoint panels similar to the panels above described to serve outside the City of New York.

Adopted.

May 20, 1987.

Renumbered.

May 10, 1989.

Direction of Arbitration

Rule 636. The Chairman of the Board, shall designate one of the officers or other employees of the Exchange as Director of Arbitration. The Director of Arbitration shall be charged with the duty of performing all ministerial duties in connection with matters submitted for arbitration pursuant to these Rules.

Adopted.

May 20, 1987.

Amended.

May 10, 1989.

Requirements When Using Pre-Dispute Arbitration Agreements With Customers

Rule 637. (1) Any pre-dispute arbitration clause shall be highlighted and shall be immediately preceded by the following disclosure language (printed in outline form as set forth herein) which shall also be highlighted:

(a) Arbitration is final and binding on the parties.

(b) The parties are waiving their right to seek remedies in court, including the right to jury trial.

(c) Pre-Arbitration discovery is generally more limited than and different from court proceedings.

(d) The arbitrators' award is not required to include factual findings or legal reasoning and any party's right to appeal or to seek modification of rulings by the arbitrators is strictly limited.

(e) The panel of arbitrators will typically include a minority of arbitrators who were or are affiliated with securities industry.

(2) Immediately preceding the signature line, there shall be a statement which shall be highlighted that the agreement contains a pre-dispute arbitration clause. The statement shall also indicate at what page and paragraph the arbitration clause is located.

(3) A copy of the agreement containing any such clause shall be given to the customer who shall acknowledge receipt thereof on the agreement or on a separate document.

(4) No agreement shall include any condition which limits or contradicts the rules of any self-regulatory organization or limits the ability of a party to file any claim in arbitration or limits the ability of the arbitrators to make any award.

(5) The requirements of this section shall apply only to new agreements signed by an existing or new customer of a member or member organization after September 7, 1989.

Adopted.

May 10, 1989.

NOTE: Additional amendments were made to the NYSE Arbitration Rules effective September 10, 1990. *See* 55 *Fed. Reg.* 38181. These amendments were not available in final published form in time for inclusion in this appendix. Principally, the amendments liberalize the availability of collective proceedings, Rule 612, allow the awarding of interest on awards, Rule 627, and modify the fee provisions, Rules 629, 631 and 633.
